

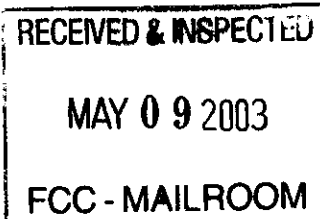
Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

)
Amendment of Part 1 of the Commission's
Rules - Competitive Bidding Procedures)

WT Docket No. 97-82



SECOND ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER
AND
ORDER ON RECONSIDERATION OF THE FIFTH REPORT AND ORDER

Adopted: April 22, 2003

Released: May 8, 2003

By the Commission: Chairman Powell and Commissioner Adelstein issuing a joint statement;
Commissioner Martin issuing a separate statement.

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I. OVERVIEW

1. In this decision, we address five petitions for reconsideration filed in response to the Commission's *Order on Reconsideration of the Part 1 Third Report and Order* and the *Part 1 Fifth Report and Order*,¹ which clarified and amended the general competitive bidding rules for all auctionable services.²

2. In the *Competitive Bidding Second Report and Order*, the Commission established general competitive bidding rules that would apply to a variety of spectrum-based services licensed by the Commission.³ In establishing these rules, the Commission intended that the general competitive bidding rules would apply to a particular service unless it adopted service-specific rules that varied from the general competitive bidding rules, contained in Part 1, Subpart Q of our rules.⁴ Subsequently, the Commission adopted competitive bidding rules for a number of services.⁵ In 1997, after completing 15

¹ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) ("*Order on Reconsideration of the Part 1 Third Report and Order*," "*Part 1 Fifth Report and Order*," and "*Part 1 Fourth Further Notice*"), modified by Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Erratum*, 15 FCC Rcd 21520 (2000) ("*Part 1 Erratum*"). As noted in Appendix B, the Commission received three petitions for reconsideration in response to the *Order on Reconsideration of the Part 1 Third Report and Order* filed by MetroPCS, NextWave, and TeleCorp, Tritel, Poplar, and Summit (jointly filed), respectively. The Commission also received four petitions for reconsideration in response to the *Part 1 Fifth Report and Order* filed by MetroPCS, NextWave, RTG, and Eliska. Subsequently, Eliska withdrew its petition for reconsideration because the clarification Eliska sought was included in the *Part 1 Erratum*. Letter from Jonathon V. Cohen, counsel for Eliska Ventures I, Inc., to Andrea Kelly, Deputy Chief, Legal Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated February 27, 2003. Two parties, MetroPCS and NextWave, filed petitions for reconsideration which addressed both the *Order on Reconsideration of the Part 1 Third Report and Order* and the *Part 1 Fifth Report and Order*.

² *Order on Reconsideration of the Part 1 Third Report and Order, Part 1 Fifth Report and Order, and Part 1 Fourth Further Notice*, 15 FCC Rcd 15293.

³ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2350, ¶ 10, 2405-12 (1994) ("*Competitive Bidding Second Report and Order*").

⁴ Accordingly, the service-specific competitive bidding rules explicitly state that the Part 1 rules apply unless otherwise provided. E.g., 47 C.F.R. §§ 21.950, 22.201, 22.228; see Amendment of Parts 1, 21, 22, 24, 25, 26, 27, 73, 74, 80, 90, 95, 100, and 101 of the Commission's Rules - Competitive Bidding, *Order*, 17 FCC Rcd 11146 (2002), as amended by *Erratum*, 17 FCC Rcd 11146 (2002) ("*Conforming Edits Order*").

⁵ See, e.g., 47 C.F.R. §§ 24.301-24.320 (1994) (narrowband Personal Communications Service ("PCS")), 47 C.F.R. §§ 24.701-24.720 (1994) (broadband PCS), 47 C.F.R. §§ 90.901-90.913 (1996) (800 MHz (continued....))

spectrum auctions and adopting service-specific competitive bidding rules for each such auction, the Commission undertook a comprehensive proceeding to expand the Part 1 general competitive bidding rules, streamline the service-specific regulations by eliminating unnecessary rules wherever possible, and increase the efficiency of the competitive bidding process.⁶ The most recent comprehensive order in the Part 1 proceeding was the *Order on Reconsideration of the Third Report and Order, Fifth Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Order on Reconsideration of the Part 1 Third Report and Order*," "*Part 1 Fifth Report and Order*," and "*Part 1 Fourth Further Notice*").⁷ Most notably, in that order, the Commission adopted as our general attribution rule a controlling interest standard, section 1.2110(c)(2).⁸ The controlling interest standard is used, among other things, to determine which applicants qualify as small businesses.⁹ The *Order on Reconsideration of the Part 1 Fifth Report and Order* addresses petitions filed in response to the *Part 1 Fifth Report and Order*. In the *Second Order on Reconsideration of the Part 1 Third Report and Order*, we address petitions filed in response to the *Order on Reconsideration of the Part 1 Third Report and Order*.

II. EXECUTIVE SUMMARY

3. In this *Order on Reconsideration of the Part 1 Fifth Report and Order*, we:

- Clarify that in calculating an applicant's gross revenues under the controlling interest standard, the personal net worth, including personal income, of its officers and directors will not be attributed to the applicant. To the extent that the officers and directors of the applicant are controlling interest holders of other entities, we will attribute the gross revenues of those entities to the applicant.
- Establish a narrow exemption for the officers and directors of a rural telephone cooperative so that the gross revenues of the affiliates of a rural telephone cooperative's officers and directors need not be attributed to the applicant. Specifically, the gross revenues of the affiliates of an applicant's officers and directors will not be attributed if either the applicant or a controlling interest, as the case may be, meets *all* of the following conditions: (1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law; (2) the applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act; and (3) the applicant (or the controlling interest) is eligible for tax-exempt status under the

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Specialized Mobile Radio (SMR)), 47 C.F.R. § 95.816 (1999) (218-219 MHz Service)), 47 C.F.R. §§ 100.71-100.80 (1995) (Direct Broadcast Satellite), and 47 C.F.R. §§ 21.921-21.961 (1995) (Multipoint Distribution Service).

⁶ See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997) ("*Part 1 Notice of Proposed Rule Making*").

⁷ *Order on Reconsideration of the Part 1 Third Report and Order, Part 1 Fifth Report and Order, and Part 1 Fourth Further Notice*, 15 FCC Rcd 15293. The *Part 1 Fourth Further Notice* was resolved in the *Part 1 Eighth Report and Order*. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Eighth Report and Order*, 17 FCC Rcd 2962 (2002) ("*Part 1 Eighth Report and Order*").

⁸ *Order on Reconsideration of the Part 1 Third Report and Order, Part 1 Fifth Report and Order, and Part 1 Fourth Further Notice*, 15 FCC Rcd at 15323-27, ¶¶ 58-67; 47 C.F.R. § 1.2110(c)(2).

⁹ 47 C.F.R. § 1.2110(c)(2).

Internal Revenue Code.¹⁰ However, the exemption will not apply if the gross revenues or other financial and management resources of the affiliates of the applicant's officers and directors (or the controlling interest's officers and directors) are available to the applicant.

- Decline to revise the controlling interest standard to exclude entities operating under control group structures.
- Modify our Part 1 default payment rule, section 1.2104(g)(2), to incorporate the combinatorial bidding default rule adopted in the *700 MHz Second Memorandum Opinion and Order*.
- Revise the Part 1 rules to make certain conforming edits in the following areas: (1) license default; (2) definition of consortium; (3) women- and minority-owned businesses; (4) clarification of the attribution rule; (5) ownership disclosure requirements; and (6) short-form disclosure requirements for small or very small business consortiums. Additionally, technical edits are made to Commission rules that refer to service-specific competitive bidding rules that have been removed, revised, or modified.

4. In this *Second Order on Reconsideration of the Part 1 Third Report and Order*, we:

- Dismiss a repetitive challenge to modifications to the installment payment rules adopted in the *Part 1 Third Report and Order* and the *Order on Reconsideration of the Part 1 Third Report and Order*.
- Reorganize section 1.2112(a) to move the requirement that each application fully disclose all "real party or parties in interest" into subsection 1.2112(a)(1). Also, conform subsection 1.2112(a)(1) to the disclosure requirements as set forth in section 1.919(e) to ensure a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant.

III. ORDER ON RECONSIDERATION OF THE PART 1 FIFTH REPORT AND ORDER

A. Controlling Interest Standard

5. Background. In the *Part 1 Fifth Report and Order*, the Commission adopted as our general attribution rule a controlling interest standard, section 1.2110(c)(2), to be used for determining which applicants are eligible for small business status.¹¹ The attribution rule¹² is significant because, among

¹⁰ 26 U.S.C. § 1381(a)(2)(C). Specifically, section 501(c)(12) of the Internal Revenue Code exempts from Federal income tax "mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses." *Id.*; see also NTCA *Ex Parte* Joint Comments at 13 (noting that to be eligible for tax-exempt status under the IRS Code, 85% of the cooperative's income or gross revenues must come from the sale of telecommunications and like-kind services to members).

¹¹ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-27, ¶¶ 58-67; see 47 C.F.R. § 1.2110(c). Previously, the attribution rules were adopted on a service-by-service basis. For example, the PCS rules provided a control group attribution rule. See, e.g., 47 C.F.R. §§ 24.709(b)(3), (b)(5) (1997). We also note that before the release of the *Part 1 Fifth Report and Order*, we had adopted the controlling interest standard in a number of service-specific rules. *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324, ¶ 59 & n. 194 (citing 47 C.F.R. § 101.1112 (Local Multipoint Distribution Service); 47 C.F.R. § 90.912 (800 MHz Specialized Mobile Radio (continued....))

other things, it is used to determine which applicants qualify as small businesses and therefore, may apply for bidding credits if they are available in a particular service.¹³ The Commission determined that the new attribution rule was simpler and more flexible than the previous service-specific standards.¹⁴ In addition, the Commission found that the controlling interest standard would ensure that only those entities truly meriting small business status would qualify for the small business provisions.¹⁵

6. Under the controlling interest standard, the Commission attributes to the applicant the gross revenues of the applicant, its controlling interests, the applicant's affiliates, and the affiliates of the applicant's controlling interests, in assessing whether the applicant is eligible for the Commission's small business provisions.¹⁶ Section 1.2110(c)(2)(i) defines a controlling interest as including "individuals or entities with either *de jure* or *de facto* control."¹⁷ Thus, there may be more than one "controlling interest" whose gross revenues must be counted. The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and such parties' affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.¹⁸

7. Section 1.2110(c) also provides specific guidance on the application of the rule to certain circumstances.¹⁹ For example, section 1.2110(c)(2)(ii)(A) explains that, for purposes of calculating

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Service); 47 C.F.R. § 90.1021 (220 MHz Service); 47 C.F.R. § 80.1252(c) (Public Coast); 47 C.F.R. § 90.1103(c) (Location and Monitoring Services)).

¹² We also note that the applicant's additional disclosures required under sections 1.2105(a)(2)(x) and 1.2105(a)(2)(xi) includes the applicant's controlling interests and affiliates, as defined by section 1.2110. 47 C.F.R. §§ 1.2105(a)(2)(x), 1.2105(a)(2)(xi); *see also Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15317, ¶ 42 & n. 142 (paragraph 42 addresses section 1.2105(a)(2)(xi) and note 142 addresses section 1.2105(a)(2)(x)). Section 1.2105(c) of the Commission's rules also defines applicant for the purpose of the anti-collusion rules as including the applicant's controlling interests. 47 C.F.R. § 1.2105(c)(7)(i).

¹³ Bidding credits ranging between fifteen (15%) and thirty-five percent (35%) and size standards for small businesses status are determined on a service-by-service basis. 47 C.F.R. § 1.2110(c)(1), (f)(2); Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 388, ¶ 18, 403-04, ¶ 47 (1997) ("*Part 1 Third Report and Order*"). In addition to bidding credits, the Commission has allowed small businesses, also known as designated entities, to participate in an installment payment plan in the following services: (1) Interactive Video and Data Service (Auction No. 2); (2) the regional narrowband PCS (Auction No. 3); (3) broadband PCS, but only for C and F block licenses (Auction Nos. 5, 10, and 11); (4) Multipoint Distribution Service (Auction No. 6); and (5) 900 MHz Specialized Mobile Radio (Auction No. 7). However, in the *Part 1 Third Report and Order*, the Commission decided to suspend the use of installment payments for future auctions. *Id.* at 398-400, ¶ 40, *aff'd*, *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15322, ¶ 55.

¹⁴ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-24, ¶ 59.

¹⁵ *Id.* at 15325, ¶ 64. The controlling interest standard "together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses." *Id.*

¹⁶ *Id.* at 15323-24, ¶ 59; 47 C.F.R. § 1.2110(b).

¹⁷ 47 C.F.R. § 1.2110(c)(2)(i); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324, ¶ 60.

¹⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324, ¶ 60.

¹⁹ 47 C.F.R. § 1.2110(c)(2).

equity held in an applicant, we generally consider ownership interests, such as warrants, stock options, and convertible debentures, on a fully-diluted basis as if those rights have already been fully exercised.²⁰ Additionally, section 1.2110(c)(2)(ii)(F) provides that the officers and directors of any applicant will be considered to have a controlling interest in the applicant.²¹ Thus, in calculating an applicant's gross revenues, the gross revenues of other entities controlled by such officers and directors must be included. Additionally, the officers and directors of an entity that controls an applicant shall also be considered to have a controlling interest in the applicant.²²

1. Attribution of Officers and Directors

a. Personal Net Worth of Officers and Directors

8. Discussion. Petitioners request that the Commission clarify that the controlling interest standard excludes from attribution the personal assets and revenues of an applicant's officers and directors.²³ Generally, the Commission has excluded personal net worth, including personal income and assets, from attribution for purposes of eligibility for small business provisions.²⁴ In making this determination, the Commission has stated that "attribution of personal net worth was not necessary because most wealthy individuals are likely to have their wealth tied to the ownership of other businesses."²⁵ We find this rationale equally applicable here. Accordingly, for purposes of the controlling interest standard, we clarify that in calculating an applicant's gross revenues under section 1.2110, the personal net worth, including personal income and assets, of its officers and directors will *not* be attributed to the applicant.²⁶ This clarification is consistent with the Commission's decisions in

²⁰ 47 C.F.R. § 1.2110(c)(2)(ii)(A).

²¹ 47 C.F.R. § 1.2110(c)(2)(ii)(F); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325, ¶ 63 & n. 203 (citing RTG Comments).

²² The gross revenues of other entities controlled by the officers and directors of an entity that controls the applicant must also be included in calculating an applicant's gross revenues. 47 C.F.R. § 1.2110(c)(2)(ii)(F).

²³ See *TeleCorp, Tritel, Poplar and Summit* Petition at 5.

²⁴ Specifically, the Commission has defined personal net worth as "the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity as a joint obligor." See former narrowband PCS rules, 47 C.F.R. § 24.320(e) (1995); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-98, PP Docket No. 93-253, *Third Report and Order*, 9 F.C.C.R. 2941, ¶¶ 8, 68 (1994) (adopting specific preferences for narrowband PCS to ensure that designated entities are given the opportunity to participate both in the competitive bidding process and in the provision of narrowband PCS services). The Commission has also explained that personal income is considered an element of personal net worth. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10086, ¶ 100 (1999) ("*Paging Reconsideration Order*").

²⁵ *Paging Reconsideration Order*, 14 FCC Rcd at 10086, ¶ 100 (citing *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 421, ¶ 30).

²⁶ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 421, ¶ 30 (1994) ("*Competitive Bidding Fifth Memorandum Opinion and Order*") (eliminating in the broadband PCS service rules the personal net (continued....))

several service-specific rulemakings.²⁷ For instance, in using the controlling interest standard to determine the eligibility of applicants in the 929-931 MHz Paging Service ("Auction No. 26") for small business bidding credits, the Commission made clear that the personal net worth, including personal income, of controlling interests was not attributable to the applicant.²⁸

9. In providing this clarification, we note that personal income of officers and directors, however, is distinguishable from the gross revenues received by any business entities such individuals may control. For example, if an officer or director were to operate a separate business, the gross revenues derived from that separate business would be attributed to the applicant, although any personal income from such separate business would not be attributed. Further, if an officer or director of an applicant were an affiliate of another entity through any ownership interest or means of affiliation,²⁹ the gross revenues of such entity would be attributed to the applicant, whereas any income derived directly by an officer or director from that entity would be considered personal income and not attributed to the applicant. Finally, we remind applicants that by operation of our rules all affiliates of controlling interests are attributable to the applicant.³⁰ Thus, although we do not attribute to the applicant the personal income of its officers and directors, to the extent that the officers and directors are controlling interest holders of other entities, we attribute the gross revenues of those entities to the applicant.³¹

b. Application of Attribution Rule to the Officers and Directors of a Rural Telephone Cooperative

10. Discussion. In its reconsideration petition, Rural Telecommunications Group ("RTG") seeks an exemption from the requirement that the gross revenues of entities controlled by an applicant's officers and directors are attributed to the applicant.³² RTG contends that the rule, as applied to rural (Continued from previous page) _____

worth limits for all applicants, attributable investors, and affiliates, concluding that the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business); *see, e.g.*, Amendments of Parts 1, 2, 87 and 101 of the Commission Rules to License Fixed Services at 24 GHz, WT Docket No. 99-238, *Report and Order*, 15 FCC Rcd 16934, 16970-71, ¶ 88 (2000) ("24 GHz Report and Order"); *Paging Reconsideration Order*, 14 FCC Rcd at 10086, ¶ 100; Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction, *Public Notice*, 13 FCC Rcd 342, 346 (1998).

²⁷ *E.g.*, *Paging Reconsideration Order*, 14 FCC Rcd at 10086, ¶ 100 (determining that, in the paging context, personal income is treated as an element of personal net worth, and thus is not attributable); Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10879, ¶ 195 (1997) (determining that, in the WCS context, the personal net worth of an applicant and its affiliates is not included in the applicant's gross revenues).

²⁸ *Paging Reconsideration Order*, 14 FCC Rcd at 10086, ¶ 100.

²⁹ 47 C.F.R. § 1.2110(c)(5).

³⁰ 47 C.F.R. § 1.2110(c)(5).

³¹ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324, ¶ 60; *see, e.g.*, Application of PVT Networks, Inc., Request for Waiver of Sections 1.2110(b) and 101.1209(e), *Order*, 15 FCC Rcd 19105, 19108 (2000) (noting that "although we do not attribute personal income of an individual with a controlling interest in the applicant, if this individual has a controlling interest in another entity our affiliation rules would make attributable to the applicant the gross revenues of that entity") (citing *24 GHz Report and Order*, 15 FCC Rcd at 16970-71, ¶ 88); *see also Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 321, ¶ 30.

³² 47 C.F.R. § 1.2110(b)(1); RTG Petition; RTG Reply.

telephone cooperatives, is overbroad, unduly burdensome, and contrary to section 309(j) of the Communications Act.³³ RTG reasons that this rule requires a rural telephone cooperative that seeks to qualify for small business bidding credits to “effectively attribute to the cooperative the gross revenues of the outside business interests of its officers and directors even though these outside business interests may be unrelated to the telecommunications industry and ... have no impact on such cooperative’s ability to raise capital or compete for FCC licenses.”³⁴ RTG states that cooperatives’ officers and directors have “no appreciable ownership interest” and “no direct financial interest that differs from the subscriber-members at large.”³⁵ RTG concludes that this rule inappropriately disqualifies rural telephone cooperative applicants from attaining small business bidding status and frustrates the objectives of the Commission’s small business bidding preference program and the mandates of section 309(j) of the Act.³⁶

11. Three parties filed comments in support of RTG’s petition for reconsideration.³⁷ NTCA and PVT reiterate the points made by RTG.³⁸ Neoworld, however, seeks to extend RTG’s proposal.³⁹ Specifically, Neoworld suggests that application of section 1.2110(c)(2)(ii)(F) to all applicants seeking small business status is contrary to the Commission’s goal of providing legitimate small businesses with maximum flexibility in attracting passive financing.⁴⁰ Neoworld argues that the Commission should not attribute to an applicant the gross revenues of a business affiliated with an officer or director where contractual relationships, such as a voting agreement, legally prevent that officer or director from exercising either *de jure* or *de facto* control over the applicant.⁴¹ In particular, Neoworld proposes that the Commission adopt a test under which an officer or director would not be considered a controlling interest if the “applicant can demonstrate that it has developed insulating mechanisms to prevent such a director from being materially involved directly or indirectly in the management or telecommunications

³³ RTG Petition at 2-9. Section 309(j) requires the Commission in designing a system of competitive bidding, among other objectives, to encourage the development and rapid deployment of new technologies, products, and services for the benefit of the public, “including those residing in rural areas.” 47 U.S.C. § 309(j)(3)(A).

³⁴ RTG Petition at 4-5.

³⁵ RTG Petition at 4; *see also* NTCA Comments at 6-7.

³⁶ RTG Reply at 1-3; *see also* NTCA Comments at 6-8; Neoworld Comments at 6-11; PVT Reply at 6-7.

³⁷ NTCA Comments; PVT Reply; Neoworld Comments.

³⁸ NTCA filed three documents with the Commission supporting RTG’s petition for reconsideration of the *Part 1 Fifth Report and Order*. NTCA’s November 26, 2002 *Ex Parte* Joint Comments, filed with RTG, is the most comprehensive of the three filings. The other two filings, October 30, 2000 Comments and a July 2, 2002 *Ex Parte* Letter, are duplicative of the November 26, 2002 *Ex Parte* Joint Comments.

³⁹ *See* Neoworld Comments. Neoworld was subsequently purchased by Nextel. *See* Wireless Telecommunications Bureau Grants Consent for the Transfer of Control of 900 MHz SMR Licenses From Neoworld License Holdings, Inc. to FCI 900, Inc., *Public Notice*, 17 FCC Rcd 7051 (2002).

⁴⁰ Neoworld Comments at 6 (citing *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325-26, ¶ 65).

⁴¹ Neoworld Comments at 7-8.

activities of the licensee.”⁴²

12. As explained below, we grant RTG’s request to exclude from attribution the gross revenues of entities controlled by a rural telephone cooperative’s officers and directors, by providing a narrow exemption only available where the gross revenues of the affiliates of a rural telephone cooperative’s officers and directors would otherwise be attributable based solely on their status as officers and directors of the rural telephone cooperative applicant or as officers and directors of a rural telephone cooperative that controls the applicant.⁴³ However, if an officer or director of a rural telephone cooperative is considered a controlling interest of the applicant under another subsection of the controlling interest attribution rule, this exemption does not apply.⁴⁴ For example, if an officer or director of the rural telephone cooperative manages its operations pursuant to a management agreement and either has authority to make certain decisions regarding the services offered by the applicant, or significantly influences such decisions, the gross revenues of other entities controlled by the officer or director would be attributed to the rural telephone cooperative.⁴⁵ Finally, as explained below, we deny Neoworld’s suggestion to broadly exempt officers and directors from the controlling interest standard where an applicant institutes a contractual mechanism in an effort to insulate officers and directors from involvement in an applicant’s telecommunications activities.

(i) Unique Business Structure of Rural Telephone Cooperatives

13. Commenters rely upon the unique nature of rural telephone cooperatives, as opposed to traditional corporations or other business forms, to justify an exemption from the requirement that the gross revenues of entities controlled by an applicant’s officers and directors are attributed to the applicant.⁴⁶ As NTCA has explained, historically, rural telephone cooperatives were developed by farmers and other residents of rural areas who sought to develop telephone services when few of the existing commercial telephone companies (such as AT&T and its Bell System) were willing to make the huge investment required to serve such large areas having so few people.⁴⁷ Unlike traditional corporations, commenters state that rural telephone cooperatives are democratic organizations controlled by their member-subscribers.⁴⁸ Typically, as NTCA highlighted, each member has equal voting rights

⁴² Neoworld Comments at 8-9.

⁴³ 47 C.F.R. § 1.2110(c)(2)(ii)(F); RTG Petition; RTG Reply.

⁴⁴ RTG concurs with this result. See RTG Petition at 3 (noting that an exemption for rural telephone cooperatives should not apply if an officer or director of a rural cooperative has the actual power to control the cooperative).

⁴⁵ 47 C.F.R. § 1.2110(c)(2)(ii)(H) (provides specific guidance regarding when management agreements cause a manager to be considered a controlling interest).

⁴⁶ RTG Petition at 3-4; RTG Reply Comments at 2; NTCA Comments 4-5; NTCA *Ex Parte* Joint Comments at 4-7; PVT Reply Comments at 2.

⁴⁷ See NTCA: History of Rural Telecommunications (2003). Retrieved February 13, 2003, from <http://www.ntca.org/about/history/>; Nex-Tech Online Directory Services: Rural Telephone. Retrieved February 13, 2003, from <http://www.ruraltelephone.com/coop/default.asp>; Co-ops 101: An Introduction to Cooperatives, USDA Rural Business-Cooperative Service, Cooperative Information Report 55, at 2-4 (1997) (“Co-ops 101”).

⁴⁸ NTCA *Ex Parte* Joint Comments at 4-5 (quoting Savage and Volkin, *Cooperative Criteria*, FCS Service Report 71, Farmer Cooperative Service, U.S. Dep. Agr. (1965)) (“A cooperative is a voluntary contractual organization of persons having a mutual ownership interest in providing themselves a needed service(s) on a non-(continued....)”).

(one member, one vote), and an individual member's ownership interest and voting power cannot be increased by contributing additional equity or otherwise.⁴⁹

14. As NTCA explained, generally speaking, a cooperative is a business owned entirely by its users (*i.e.*, telephone subscribers) and its earnings are derived from and distributed on the basis of use.⁵⁰ Unlike a traditional corporation, ownership of the cooperative remains in the hands of patrons of the cooperative (*i.e.*, telephone subscribers) rather than in non-patron equity investors.⁵¹ As elaborated by NTCA, although a cooperative's members contribute equity capital to the cooperative, the amount of any surpluses are distributed to subscribers in proportion to their use of the cooperative's services.⁵² To be operating on a cooperative basis, a cooperative must limit the financial return on any equity capital investments.⁵³ NTCA suggests that because a cooperative may not be operated for the purpose of paying a return on equity investments, cooperatives may have greater difficulties in raising investment capital than other types of corporate entities.⁵⁴ As the commenters explained, rural telephone cooperatives are typically formed as non-profit or not-for-profit corporations,⁵⁵ and many are exempt from taxation under section 501(c)(12) of the Internal Revenue Code.⁵⁶ Congress adopted this tax exemption, at least in part,

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profit basis. It is usually organized as a legal entity to accomplish an economic objective through joint participation of its members. In a cooperative, the investment and operational risks, benefits gained, or losses incurred are shared equitably by its members in proportion to their use of the cooperative's services. A cooperative is democratically controlled by its members on the basis of their status as member-users and not as investors in the capital structure of the cooperative."); NTCA Comments at 4; RTG Petition at 3.

⁴⁹ NTCA Comments at 4; NTCA *Ex Parte* Joint Comments at 5, 14 (citing excerpts of PVT's bylaws) ("each member shall be entitled to only one vote upon each matter submitted to a vote at a meeting of the members").

⁵⁰ NTCA Comments at 4-5 (outlining four basic practices and procedures that characterize cooperatives: (1) cooperatives have open membership, (2) each member has one vote, (3) purpose of cooperative is to provide a service to its members, and (4) members do not own stock); NTCA *Ex Parte* Joint Comments at 4; *see Co-ops 101* at 5-7.

⁵¹ NTCA Comments at 4-5; NTCA *Ex Parte* Joint Comments at 4; *see Co-ops 101* at 5-7.

⁵² NTCA Comments at 4-5.

⁵³ This is frequently required by statutes under which cooperatives are organized. *See, e.g.*, New Mexico Cooperation Act, N.M. Stat. Ann. § 53-4-1 et seq. (Michie 1978) (restricting interest dividends to fifteen percent, limiting the return members can expect for capital contributions to the cooperative); Colo. Rev. Stat. Ann. § 7-56-301 et seq. (West 2002) (a cooperative, in its articles or bylaws, may limit the amount of common stock or other equity capital held by members or other persons); Okl. St. Ann. tit. 2, § 17-3 et seq. (West 2002) (a cooperative marketing association means any corporation organized for the mutual benefit of its members, in which the return on the stock or membership capital is limited to an amount not to exceed eight percent (8%) per annum). In addition, such restrictions often appear in a cooperative's bylaws. *See* NTCA *Ex Parte* Joint Comments at 13-17 (providing excerpts of PVT's bylaws).

⁵⁴ NTCA *Ex Parte* Joint Comments at 3 ("[t]he controlling interest rule's approach to attribution has a disproportionately negative impact on cooperative business forms compared to other business forms; and thereby denies cooperatives the ability to fairly participate in spectrum-based services.").

⁵⁵ NTCA *Ex Parte* Joint Comments at 4; NTCA Comments at 4; RTG at 4.

⁵⁶ 26 C.F.R. § 1.501(c)(12)-1 (Income Tax Regulations). Under section 501(c)(12) of the Internal Revenue Code, cooperatives may qualify for a tax exemption if 85% of the cooperative's income consists of (continued....)

out of recognition that rural telephone cooperatives are the sole providers of necessary communications services to under-served parts of the nation.⁵⁷

(ii) **Limited Exemption for Rural Telephone Cooperatives**

15. We agree with petitioners that, in light of the unique nature of rural telephone cooperatives, an exemption from the requirement that the gross revenues of entities controlled by a rural telephone cooperative's officers and directors are attributed to the applicant would not undermine the purpose of the controlling interest attribution rule.⁵⁸ As explained above, the attribution rules are intended to eliminate incentives for entities to create small business "fronts" that would enable large firms to secure a benefit to which they are not entitled, *i.e.*, small business bidding credits.⁵⁹ We agree with the commenters' explanation that the key differences between rural cooperatives and other structures make it highly unlikely that rural telephone cooperatives would be able to participate in the types of sham transactions the rule is designed to protect against.⁶⁰ For example, ownership and control of the cooperative remain in the hands of patrons of the cooperative (*i.e.*, telephone subscribers), rather than in non-patron equity investors as is often the case with traditional corporations or other business forms.⁶¹ Additionally, unlike traditional corporations or other business forms, the outside business interests of individual officers and directors of rural telephone cooperatives are not financial and management resources available to the cooperative.⁶² Further, because of the democratic structure of cooperatives, the patrons of each cooperative control the cooperative.⁶³ Finally, members contribute equity to, and control,

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amounts collected from the cooperative's members for the sole purpose of meeting losses and expenses. 26 U.S.C.A. § 501(c)(12); *see Consumers Credit Rural Electric Cooperative Corp. v. Commissioner*, 37 T.C. 136 (1961), *aff'd in pertinent part*, 319 F.2d 475 (1963); *see also* 26 U.S.C. § 1381(a)(2)(C) (tax exemption for telephone cooperatives); NTCA *Ex Parte* Joint Comments at 12-13.

⁵⁷ Congress established this tax exemption in 1962 in order to minimize regulations on rural telephone cooperatives. *See, e.g.*, IRS Private Letter Ruling, PLR 200152035, 2001 WL 1660001 (issued Dec. 28, 2001) (citing H.R. Rep. No. 1447, 87th Cong., 2d Sess. 79, A127 (1962); S. Rep. No. 1881, 87th Cong., 2d Sess. 113, 310 (1962)); *see also*, Rev. Rul. 83-135, 1983-2 C.B. 149. The IRS has also found that Congress intended to provide rural telephone cooperatives with more flexible tax treatment because of the necessary services they provide to under-served parts of the country. *See* IRS Private Letter Ruling, PLR 200152035, 2001 WL 1660001 (issued Dec. 28, 2001) (citing H.R. Rep. No. 1447, 87th Cong., 2d Sess. 79, A127 (1962); S. Rep. No. 1881, 87th Cong., 2d Sess. 113, 310 (1962)); *see generally* NTCA Comments 4-5.

⁵⁸ *See, e.g.*, RTG Petition at 3, 5; NTCA Comments at 5. NTCA also asserts that individual directors have no greater financial stake in a cooperative than any other member. NTCA Comments at 4.

⁵⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2390, ¶ 237 (1994).

⁶⁰ RTG Petition; NTCA Comments; PVT Reply; Neoworld Comments.

⁶¹ *See, e.g.*, NTCA *Ex Parte* Joint Comments at 7.

⁶² Commenters have indicated that rural cooperatives do not have access to the financial or other resources of the outside business activities of their officers and directors and, accordingly, the gross revenues of the outside business activities should not be used to determine eligibility for small business status. NTCA *Ex Parte* Joint Comments at 3 ("The outside business interests of individual officers and directors of rural telephone cooperatives are not *financial resources* available to the cooperative, have no impact on the cooperative's access to capital, . . .") (emphasis added); *see also* RTG Petition at 7 ("The outside business interests do not contribute their resources to the cooperative."); NTCA Comments at 6-7.

⁶³ NTCA *Ex Parte* Joint Comments at 4.

the capital of the cooperative, as opposed to outside investors.⁶⁴ In light of these factors, grant of RTG's petition does not undermine the purpose of the controlling interest attribution rule.

16. Accordingly, based upon the comments received, we adopt a narrow exemption for the officers and directors of a rural telephone cooperative so that the gross revenues of the affiliates of a rural telephone cooperative's officers and directors need not be attributed to the applicant.⁶⁵ In our experience, rural telephone cooperatives frequently create wholly owned subsidiaries, or similar entities, to participate in Commission auctions.⁶⁶ Accordingly, this exemption for the applicant's officers and directors would also extend to situations where the applicant is not a rural telephone cooperative but is controlled by an eligible rural telephone cooperative.⁶⁷ Specifically, the gross revenues of the affiliates of an applicant's officers and directors will not be attributed if either the applicant or a controlling interest, as the case may be, meets *all* of the following conditions: (1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law;⁶⁸ (2) the applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act;⁶⁹ and (3) the applicant

⁶⁴ *Id.* at 6-7.

⁶⁵ 47 C.F.R. § 1.2110(b)(3)(iii) as adopted herein. We note that an applicant that avails itself of this exemption to qualify for small business status will be required to pay any unjust enrichment penalties if it seeks to transfer or assign its licenses to entities that do not qualify for a bidding credit, or that qualify for a different level of bidding credit. *See* 47 C.F.R. § 1.2111(d).

⁶⁶ *See* Applications to Participate in an FCC Auction (FCC 175) of Cable and Communications Corporation, and Poka Lambro Telecommunications, Ltd. (initially filed May 8, 2002) (respectively, the "C&C Application, Northeast Application, and Poka Lambro Application"); Applications to Participate in an FCC Auction (FCC 175) of Adams Telcom, Inc., Cable and Communications Corporation, Coleman County Telecommunications, Ltd., Grand River Communications, Inc., S.E.I. Data, Inc., and WCTA Wireless, Inc. Short form applications for Auction Nos. 44 and 49, including the instant applications, may be viewed on the Commission's auctions Web site. *See* <https://auctionfiling.fcc.gov/form175/index.htm>.

⁶⁷ For example, X is a rural telephone cooperative that satisfies all the elements of the exemption. X creates a subsidiary Y. Y's officers and directors are controlling interests solely based upon their status as officers and directors – *i.e.*, solely pursuant to section 1.2110(c)(2)(ii)(F). Y has no other controlling interests. Then, for purposes of determining eligibility for small business provisions, the gross revenues of the affiliates of X's officers and directors and affiliates of Y's officers and directors are not attributed to Y. If, however, Y has another controlling interest (other than Y's officers and directors and X's officers and directors) that is not an eligible rural telephone cooperative or controlled by an eligible rural telephone cooperative, then the exemption does not apply to Y's officers and directors or such controlling interest's officers or directors. However, the gross revenues of the affiliates of X's officers and directors would not be attributed to Y.

⁶⁸ A cooperative is defined pursuant to state law not federal law. Accordingly, we require that a rural telephone cooperative be validly organized as a cooperative under state law. *See e.g.*, New Mexico Cooperation Act, N.M. Stat. Ann. § 53-4-1 (Michie 1978); Colo. Rev. Stat. Ann. § 7-56-103 (West 2002).

⁶⁹ 47 U.S.C. § 153(37). The term "rural telephone company" is defined in 47 U.S.C. § 153(37) and in 47 C.F.R. §§ 1.2110(c)(4) and 51.5. Since passage of the Telecommunications Act of 1996, the Commission generally has used the statutory definition to determine which local exchange carriers can be classified as rural telephone companies. The statutory definition uses a range of standards, including the population of a jurisdiction and the number of access lines serving communities of various sizes. Specifically, section 153(37) states:

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity –

(A) provides common carrier service to any local exchange carrier study area

(continued....)

(or the controlling interest) is eligible for tax-exempt status under the Internal Revenue Code.⁷⁰ However, the exemption will not apply if the gross revenues or other financial and management resources of the affiliates of the applicant's officers and directors (or the controlling interest's officers and directors) are available to the applicant.⁷¹ Further, we note that the mere presence of an eligible rural telephone cooperative as a controlling interest will not ensure that the exemption is wholly applicable to the applicant. Thus, where an applicant is not an eligible rural telephone cooperative, if the applicant has a controlling interest (other than the applicant's officers and directors or the eligible rural telephone cooperative's officers and directors) that is not an eligible rural telephone cooperative, or controlled by an eligible rural telephone cooperative, the exemption will not apply to the applicant's officers and directors or such controlling interest's officers and directors. However, in that situation, the gross revenues of the affiliates of the eligible rural telephone cooperative's officers and directors would not be attributed to the applicant. The exemption we create here is appropriate because where the eligible rural cooperative ultimately controls the applicant the gating criterion of the cooperative structure precludes the applicant from being a sham entity.

17. The exemption we adopt here is tailored to the factual assertions and policy arguments provided by commenters.⁷² The test we adopt here will ensure that our general assumptions regarding (Continued from previous page)

that does not include either –

- (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
- (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

47 U.S.C. § 153(37).

⁷⁰ 26 U.S.C. § 1381(a)(2)(C). Specifically, section 501(c)(12) of the Internal Revenue Code exempts from Federal income tax “mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.” *Id.*; see also NTCA *Ex Parte* Joint Comments at 13 (noting that to be eligible for tax-exempt status under the IRS Code, 85% of the cooperative's income or gross revenues must come from the sale of telecommunications and like-kind services to members).

⁷¹ This element limits the relief to those cooperatives, or their subsidiaries, that do not benefit from the financial and management resources of the outside businesses affiliated with the cooperatives' officers and directors, or the subsidiary's officers and directors. See RTG Petition at 3. Thus, an officer and director could not use the outside resources of entities they control to guarantee a loan to the cooperative and retain the exemption. NTCA's model bylaws for a telephone cooperative would also generally preclude such a result. NTCA *Ex Parte* Joint Comments at 8-11. Similarly, an officer or director could not use the legal or human resource departments of outside business activities they control to, in effect, subsidize the cooperative applicant. This is consistent with the commenters' assertions that a cooperative has no business relationship with entities controlled by its officers and directors. See PVT Reply Comments at 6-7 (“the cooperative has no business relationship with such outside businesses, and has no means of accessing outside business revenues.”).

⁷² See RTG Petition; NTCA Comments; NTCA *Ex Parte* Joint Comments; PVT Reply; Neoworld Comments.

cooperatives hold true with respect to each applicant seeking to avail itself of this exemption. Thus, for example, we are limiting this exemption only to those rural telephone cooperatives that are eligible for Federal tax-exempt status (*i.e.*, those that derive 85% or more of their income from subscribers).⁷³ Adopting such an objective factor, as well as the other objective factors, will ensure that such exemption would be used only by *bona fide* community-based cooperatives, not sham entities.⁷⁴ We believe that our action here will increase the number of rural telephone cooperatives that are eligible for small business status (and the corresponding bidding credits). Such a result will enhance the ability of rural telephone cooperatives to participate in spectrum auctions. This, in turn, will promote the deployment of advanced telecommunications services in rural areas as Congress mandated in Section 309(j).⁷⁵

18. Accordingly, we hereby incorporate this exemption into the controlling interest standard contained in section 1.2110.⁷⁶ If an applicant uses this exemption, its certification on its short-form application (FCC Form 175)⁷⁷ that it “is qualified as a designated entity under § 1.2110”⁷⁸ constitutes a certification that it is eligible for this narrow exemption. In addition, in the long-form application (FCC Form 601) and in the application for assignment or transfer of control (FCC Form 603), applicants seeking to use this exemption will be required to establish eligibility for this exemption based on the

⁷³ See 26 U.S.C. § 1381(a)(2)(C); see NTCA *Ex Parte* Joint Comments at 13.

⁷⁴ See NTCA *Ex Parte* Joint Comments at 3, 4-11; NTCA Comments 4-5; RTG Petition at 3, 6; RTG Reply Comments at 2; PVT Reply Comments at 2, 6-7. As we noted in the *Part 1 Fifth Report and Order*, “application of the principles of either *de jure* or *de facto* control will accurately identify those investors that are controlling interests and that are not, by definition, ‘passive investors.’” *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325, ¶ 63; see *CF Industries, Inc. v. Commissioner of Internal Revenue*, 995 F.2d 101, 104 (7th Cir. 1993) (the court noted that, because the earnings that a cooperative retains are taxed as income to the cooperative and earnings that are distributed to the members are taxed as income to the members, it is not aware of any opportunities for tax avoidance by use of the cooperative form).

⁷⁵ 47 U.S.C. § 309(j)(3)(A). In an effort to fulfill the rural service objectives set forth in Section 309(j), the Commission has also adopted a number of policies intended, among other things, to encourage the provision of spectrum-based services to rural areas. Specifically, these policies include: (1) the availability of small business bidding credits; (2) the designation of various sizes of geographic service areas for spectrum licenses; (3) the opportunity to obtain licenses through service area partitioning and spectrum disaggregation arrangements with existing licensees; and (4) the adoption of construction benchmark performance requirements. Generally, after notice and comment, we have addressed these policies in adopting service rules for particular spectrum bands. See, *e.g.*, Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Notice of Proposed Rulemaking*, 17 FCC Rcd 24 (2002); see *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15320-21, ¶ 52. The Commission has also recently released a Notice of Inquiry seeking comment on whether and how the Commission could modify its policies to promote the further development and deployment of wireless services to rural areas, pursuant to Section 309(j) of the Communications Act. Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 25554 (2002) (“*Rural NOP*”).

⁷⁶ 47 C.F.R. § 1.2110(b)(3)(iii) as adopted herein. We note, however, for purposes of determining an assignee’s or transferee’s eligibility for benefits offered to small businesses, such as bidding credits and installment financing, and the application of the unjust enrichment provisions, all applicants will be subject to the attribution rules in effect at the time of filing their applications for assignment or transfer of control. *Infra* ¶ 22; 47 C.F.R. § 1.2111(d).

⁷⁷ Section 1.2105(a)(2)(iv) provides specific certification requirement for designated entities explicitly incorporating section 1.2110. 47 C.F.R. § 1.2105(a)(2)(iv).

⁷⁸ *Id.*

factors listed above.⁷⁹

19. Consistent with the policy objectives underlying our decision, we take this opportunity to grant three pending waiver requests filed by rural telephone cooperative applicants in Auction No. 44.⁸⁰ Specifically, three winning bidders that are rural telephone cooperatives (or wholly-owned by rural telephone cooperatives) filed substantively identical requests for waiver of Section 1.2110(c)(2)(ii)(F).⁸¹ In connection with their demonstrations of eligibility for designated entity bidding credits, these applicants argued that the gross revenues of the affiliates of the cooperative's officers and directors should not be attributed to the cooperative. They note that the outside business interests of the cooperative's officers and directors "have no impact on the cooperative's ability to raise capital or compete for FCC licenses" due to the cooperative structure under which they are organized.⁸² We believe that waiver of the requirement that the gross revenues of entities controlled by a rural telephone cooperative's officers and directors are to be attributed to the applicant would be consistent with our decision to adopt an exemption for rural telephone cooperatives and would promote the development of additional wireless services in their particular rural communities.⁸³ Accordingly, consistent with our decision here, we grant these waivers conditioned upon the submission to the Commission of information demonstrating the applicant's compliance with the factors adopted herein.

20. At the same time, we deny Neoworld's suggestion to broadly exempt officers and directors from the controlling interest standard where an applicant institutes a contractual mechanism to insulate officers and directors from involvement in an applicant's telecommunications activities.⁸⁴ Generally, section 1.2110(c)(2)(ii)(F) reflects the corporate reality that business decisions and corporate policy are established by a corporation's board of directors and officers.⁸⁵ Providing a broad exemption for officers and directors of an applicant would ultimately underestimate the role of officers and directors in an organization; thereby potentially providing large businesses with a significant monetary benefit reserved only for eligible small businesses.⁸⁶ Such a result is contrary to the Commission's intent when adopting the controlling interest rule.⁸⁷ As the Commission noted in the *Part 1 Fifth Report and Order*, the

⁷⁹ See 47 C.F.R. § 1.2112(b)(2)(iv) as adopted herein.

⁸⁰ Auction No. 44 offered licenses in the C and D blocks of the Lower 700 MHz band. The auction concluded on September 18, 2002. Additional information on Auction No. 44, including auction results, may be found on the Commission's auctions Web site. See <http://wireless.fcc.gov/auctions/44/>.

⁸¹ See Applications to Participate in an FCC Auction (FCC 175) of Cable and Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. (initially filed May 8, 2002) (respectively, the "C&C Application, Northeast Application, and Poka Lambro Application"). Short form applications for Auction No. 44, including the instant applications, may be viewed on the Commission's auctions Web site. See <https://auctionfiling.fcc.gov/form175/index.htm>.

⁸² C&C Application, Northeast Application, and Poka Lambro Application, Exhibit F.

⁸³ *Id.*

⁸⁴ Neoworld Comments.

⁸⁵ See 47 C.F.R. § 1.2110(c)(2)(ii)(F).

⁸⁶ This monetary benefit, *i.e.*, a bidding credit, ranges between 15% and 35%. See 47 C.F.R. § 1.2110(c)(1), (f)(2)

⁸⁷ See generally *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323, ¶ 59.

Commission adopted the attribution rules to ensure that small business bidding credits are extended only to *bona fide* small businesses.⁸⁸ Further, adoption of Neoworld's drastic revision to our rules would essentially require the Commission to conduct a case-by-case review of the specific insulating mechanism employed to ensure that the arrangements are legitimate and are not sham transactions.⁸⁹ In contrast, the exemption we adopt here for rural telephone cooperatives does not require such a case-by-case analysis. As we explain above, the cooperative's structure coupled with the factors identified above serves as gating criteria obviating a need for such a case-by-case analysis. Finally, with respect to Neoworld's assertion that its proposal would provide additional flexibility for small businesses seeking to attract passive financing, we note that our current rules provide ample opportunity for passive investment.⁹⁰ Therefore, based on our experience in administering small business preferences, we conclude that an across-the-board change to section 1.2110(c)(ii)(F) is not warranted. Accordingly, we deny Neoworld's petition for reconsideration.

2. PCS C and F Block Issues

21. Background. In the *Part 1 Fifth Report and Order*, the Commission explained that existing restricted C/F block licensees⁹¹ were not required to restructure their businesses to comply with the controlling interest standard in order to remain licensees.⁹² Similarly, with respect to transfers of control and assignments, those licensees may continue to acquire C/F block licenses within the first five years of license grant consistent with the anti-trafficking provisions contained in section 24.839 of the Commission's rules.⁹³ In the *Part 1 Fifth Report and Order*, the Commission explained that other

⁸⁸ See *id.* at 15323-24, ¶ 59.

⁸⁹ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2390, ¶ 237 (1994).

⁹⁰ See *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15226, ¶ 65.

⁹¹ At the time of the *Part 1 Fifth Report and Order*, broadband PCS C and F block licenses were subject to certain eligibility restrictions under section 24.709. 47 C.F.R. § 24.709 (1999). Thus, in the first four C and F block auctions, Auction Nos. 5, 10, 11 and 22, in order to be eligible to bid, an applicant, including attributable investors and affiliates, was required to have gross revenues of less than \$125 million in each of the last two years and less than \$500 million in total assets. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, at 5581-82, ¶ 115 (1994) ("*Competitive Bidding Fifth Report and Order*"); 47 C.F.R. § 24.709(a)(1). Prior to adoption of the *Part 1 Fifth Report and Order*, eligibility to hold restricted C/F block licenses was determined by using the control group attribution rule. 47 C.F.R. §§ 24.709(b)(5),(6) (1999). Shortly after the adoption of the *Part 1 Fifth Report and Order*, the Commission adopted the *C/F Block Sixth Report and Order and Order on Reconsideration*, which modified the transfer restrictions for C and F block licenses. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000) ("*C/F Block Sixth Report and Order*"). Specifically, with respect to future auctions, the Commission eliminated the C/F block eligibility restrictions for certain licenses making them available to all otherwise qualified applicants in "open" bidding. Other licenses would continue to be subject to C/F block eligibility restrictions and would be available only to eligible applicants in "closed" bidding. *Id.* at 16289, ¶ 47. For convenience sake, we will refer to licenses subject to eligibility restrictions as "restricted C/F block licenses" and holders of such licenses as "restricted C/F block licensees."

⁹² *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15326-27, ¶ 67.

⁹³ See *id.* at 15326-27, ¶ 67; 47 C.F.R. § 24.839(d). Specifically, section 24.839(a) of the Commission's rules prohibits the assignment or transfer of control of C or F block PCS licenses within the first five (continued....)

entities, however, were precluded from being assignees and transferees of restricted C/F block licenses within the first five years of license grant unless they qualified for the licenses based on the attribution rules in effect *at the time of assignment or transfer*.⁹⁴ Subsequently, an Erratum was released on November 3, 2000 ("*Part 1 Erratum*"), which made minor corrections to the text and final rules of the *Part 1 Fifth Report and Order* to clarify that these entities were precluded from being assignees and transferees of such licenses unless they were qualified to hold the license *at the time of filing an application for assignment or transfer*.⁹⁵ Moreover, as stated in the *Part 1 Fifth Report and Order*, for all future C/F block auctions, all applicants will be subject to the attribution rules in effect at the time of filing their short-form applications.⁹⁶

a. Application of Controlling Interest Standard to Control Group Structures

22. Discussion. TeleCorp, Tritel, Poplar, and Summit ("Petitioners") request that the Commission revise the controlling interest standard to exclude entities operating under the Commission's previously adopted control group structure.⁹⁷ Petitioners state that they are concerned that the controlling interest standard could be interpreted to provide that officers and directors are always considered to have

(Continued from previous page)

years after initial licensing, except pursuant to one of the specific exceptions set forth in the rule. 47 C.F.R. § 24.839(a). One exception, section 24.839(a)(2) permits the assignment or transfer of C and F block PCS licenses to an entity that either (1) is eligible at the time it files the assignment or transfer application or (2) holds other C or F block PCS licenses and was eligible when it acquired those licenses. 47 C.F.R. § 24.839(a)(2); Applications of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc., WT Docket No. 00-130, *Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3725-26, ¶¶ 21-29 (2000) ("*TeleCorp Order*") (explaining the application of section 24.839(a)(2) to affiliates and the concept of "permissible growth.")

⁹⁴ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15326-27, ¶ 67 (emphasis added). The attribution rules became effective on October 30, 2000. In addition, other entities may acquire restricted C/F block licenses during the first five years of license if the licensee has satisfied the exemption in section 24.839(a)(6). 47 C.F.R. § 24.839(a)(6). However, "the Commission stressed that the decision to transfer a restricted license to a non-entrepreneur before the end of the five-year holding period in this manner must be made affirmatively by those in control of the entrepreneur." Application of ClearComm, L.P. for Consent to Pro Forma Assignment to NewComm Wireless Services, Inc., of C Block Broadband PCS Licensees for BTAs B488 and B489, *Memorandum Opinion and Order*, 16 FCC Rcd 18627, 18636, n. 57 (2001) (citing *C/F Block Sixth Report and Order*, 15 FCC Rcd at 16290, ¶ 49).

⁹⁵ *Part 1 Erratum*, 15 FCC Rcd at 21520, ¶ 1.

⁹⁶ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15326, ¶ 67. We note that for a limited time the Commission had in place a "grandfathering" exception whereby any entity that was eligible for, and participated in, either of the first two C block auctions (Auction No. 5 or Auction No. 10), would be eligible to bid for restricted C block spectrum. The exception has since expired. 47 C.F.R. § 24.709(a)(5)(i)(2000); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15751-52, ¶¶ 13, 15 (1998) ("*C Block Fourth Report and Order*").

⁹⁷ TeleCorp, Tritel, Poplar, and Summit Petition at 2-3. We note that on February 12, 2002, the Wireless Telecommunications Bureau and the International Bureau approved applications requesting consent to transfer control of or assign licenses and authorizations currently held by TeleCorp and its various wholly-owned subsidiaries to AT & T Wireless Services, Inc. Wireless Telecommunications Bureau and International Bureau Grant Consent for Transfer of Control or Assignment of Licenses From TeleCorp PCS, Inc. to AT & T Wireless Services, Inc., WT Docket No. 01-315, *Public Notice*, 17 FCC Rcd 2383 (2002) ("*TeleCorp/Tritel Public Notice*").

a controlling interest even under a control group structure.⁹⁸ Petitioners argue that a literal reading of the rule could be used to expand the definition of affiliates so that greater gross revenues and assets would be attributed on that basis alone.⁹⁹ Specifically, Petitioners request that newly established affiliates of existing restricted C/F block licensees that were structured so as to establish their eligibility under a control group attribution rule be able to utilize the same structure used by the existing restricted C/F block licensee to establish their eligibility.¹⁰⁰ We note that Petitioners did not indicate the context of their request, *i.e.*, whether they sought to use the control group attribution rule solely to determine eligibility to hold a restricted C/F block license, or also to determine if an unjust enrichment payment would be owed upon transfer of control or assignment of such a license.¹⁰¹

23. To the extent Petitioners are seeking a modification to our rule, we deny their petitions for reconsideration and affirm the Commission's decision in the *Part I Fifth Report and Order* to consider officers and directors as controlling interests in a licensee or applicant. However, to avoid similar questions in the future, we take this opportunity to restate the application of the attribution rules with respect to eligibility to hold restricted C/F block licenses. Generally, if an applicant does not hold a restricted C/F block license under the former control group rules it must use the controlling interest attribution rule to determine eligibility to hold restricted C/F block licenses, whether through auctions or through assignment or transfer of control.¹⁰² However, with respect to the acquisition of restricted C/F block licenses through assignment or transfer of control, wholly-owned subsidiaries and commonly controlled affiliates (whether newly formed or in existence prior to the adoption of the controlling interest attribution rule) that establish their eligibility directly through an existing restricted C/F block licensee, will be eligible to hold a C/F block restricted license to the same extent as the existing restricted C/F block licensees.¹⁰³ Thus, in the context of an application to assign or transfer a restricted C/F block license, the eligibility of an existing restricted C/F block licensee (that obtained its license under the former control group rules) and its wholly owned subsidiaries and commonly controlled affiliates to hold such licenses (as opposed to eligibility for small business provisions such as bidding credits) may be determined without application of the controlling interest attribution rule.¹⁰⁴ This explanation does not

⁹⁸ TeleCorp, Tritel, Poplar, and Summit Petition at 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 4.

¹⁰¹ We note that with respect to TeleCorp and Tritel, the petition may no longer be relevant. See *supra* n. 94. The Bureau has addressed any questions regarding the application of the attribution rules as they pertain to TeleCorp, Tritel, and its various wholly-owned subsidiaries, when acting on TeleCorp's applications to transfer control of or assign licenses (as well as related petitions to deny and waiver requests) as part of the underlying proposed merger of TeleCorp, Tritel, and Indus, Inc. *TeleCorp Order*, 16 FCC Rcd 3716.

¹⁰² *Part I Fifth Report and Order*, 15 FCC Rcd at 15326, ¶ 67.

¹⁰³ *TeleCorp Order*, 16 FCC Rcd at 3725-26, ¶¶ 21-23 ("Section 24.839(a)(2) of the Commission's rules permits assignments and transfers of control of C and/or F block licenses directly to commonly controlled affiliates of existing C and F block licensees, provided that those licensees remain eligible pursuant to section 24.709.").

¹⁰⁴ For example, X creates a wholly-owned subsidiary Y. X also has a commonly controlled affiliate Z. X obtained its restricted C/F block licenses under the former control group rules. W, an unrelated party, also obtained its restricted C/F block licenses under the former control group rules. W seeks to assign its restricted C/F block licenses to Y and Z. Because X, Y, and Z are commonly controlled, Y and Z may establish their eligibility to hold restricted C/F block licenses through X without application of the controlling interest attribution standard. Further, X, Y, and Z will continue to be eligible to hold restricted C/F block licenses (continued....)

alter the determination that, as stated in the *Part 1 Fifth Report and Order*, for all future C/F block auctions, all applicants will be subject to the attribution rules in effect at the time of filing their short-form applications.¹⁰⁵

24. We further note that, for purposes of determining an assignee's or transferee's eligibility for benefits offered to small businesses, such as bidding credits and installment financing, and the application of the unjust enrichment provisions, all applicants will be subject to the attribution rules in effect at the time of filing their applications for assignment or transfer of control.¹⁰⁶ The Commission has previously determined that the fact that an existing restricted C/F block licensee may choose to retain a control group structure does not exempt it from attributing the gross revenues of its affiliates, including the gross revenues of other entities controlled by its officers and directors, to the licensee for purposes of determining eligibility for small business provisions, such as bidding credits and installment financing.¹⁰⁷

B. Calculation of Default Payments in Combinatorial Bidding

25. Background. The Commission's general competitive bidding rules provide that if a bidder defaults on a down or final payment obligation, it is liable for a default payment that contains a deficiency portion, equal to the difference between the amount it bid and the amount of the winning bid the next time the Commission offers the license, plus an additional payment, equal to three percent (3%) of the subsequent winning bid or 3% of the subsequent bidder's bid, whichever is less.¹⁰⁸ Default payments are calculated on a license-by-license basis; that is, where a bidder defaults on multiple

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provided they comply with the requirements of section 24.709. See *TeleCorp Order*, 16 FCC Rcd at 3725-26, ¶¶ 23-41. Significantly, X, Y, and Z can only exceed the total assets test by permissible growth pursuant to section 24.709(a)(2). *Id.* at ¶ 29.

¹⁰⁵ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15326, ¶ 67.

¹⁰⁶ See *TeleCorp Order*, 16 FCC Rcd at 3733, ¶42 (the unjust enrichment rule requires those seeking to transfer or assign licenses to entities that do not qualify for a bidding credit, or that qualify for a different level of bidding credit, to reimburse the government for the amount of the bidding credit or for the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify.); *C/F Sixth Report and Order*, 15 FCC Rcd. at 16290, ¶51 & n. 156 (C block licensees in Auction Nos. 5 and 10 are exempt from a bidding credit unjust enrichment payment but not from other unjust enrichment payment requirements for licenses won in these auctions); *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395, ¶ 263 (where an installment payment licensee, during the term of the license, seeks to assign or transfer control of its license to an entity that does not qualify under the small business standards, the Commission will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.); 47 C.F.R. § 1.2111(d). We note, however, that where an assignment or transfer of control is *pro forma* in nature, we do not require an unjust enrichment payment. *TeleCorp Order*, 16 FCC Rcd at 3733, ¶ 43.

¹⁰⁷ *Part 1 Fifth Report and Order* at 15326-27, ¶ 67.

¹⁰⁸ 47 C.F.R. § 1.2104(g)(2); BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17600-1, ¶ 17 (2000) ("*BDPCS Memorandum Opinion & Order*"). The rule contains further details as to how the amounts are calculated in the case where either bid is subject to a bidding credit. Also, when a bidder defaults and the license has not yet been subject to a subsequent auction, the Commission assesses an initial default payment between three percent (3%) and twenty percent (20%) of the defaulted bid amount. When the license is reaucted, the Commission assesses the final default payment and applies the initial default payment and any remaining funds on deposit against the final default payment. Finally, the Commission requests payment of any outstanding balance or refunds the remaining funds to the payor of record, as appropriate. *Part 1 Third Report and Order*, 13 FCC Rcd at 434, ¶ 102.

licenses, the payments are calculated separately for each license. Gains realized from the subsequent auction of licenses for which the subsequent winning bid is higher than the defaulter's bid are not used to offset losses incurred on those licenses for which the winning bid is lower than the defaulter's bid.¹⁰⁹

26. In an auction with a combinatorial (package) bidding design, a bidder that bids on a package is not placing separate bids on the individual licenses making up that package. Rather, combinatorial bidding is an auction design that allows for bids on combinations, or "packages," of licenses.¹¹⁰ Thus, in an auction with combinatorial bidding, it is impossible to apply the default rules in the same manner as they are applied in a simultaneous multiple round auction without combinatorial bidding.¹¹¹ For this reason, the Commission, in the *700 MHz Notice of Proposed Rulemaking*, generally sought comment on the use of a combinatorial bidding design.¹¹² Subsequently, the Bureau issued a *Public Notice* that sought comment on procedures for implementing combinatorial bidding for Auction No. 31.¹¹³ This *Public Notice* was published in the Federal Register.¹¹⁴ The *Auction No. 31 Combinatorial Bidding Comment Public Notice* also sought comment on the application to a combinatorial bidding auction of the general competitive bidding rules regarding default.¹¹⁵ The Bureau received three comments and one reply comment on this issue.¹¹⁶ After careful review of the comments, the Bureau issued another *Public*

¹⁰⁹ *BDPCS Memorandum Opinion & Order*, 15 FCC Rcd at 17602-4, ¶¶ 20-25.

¹¹⁰ Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Public Notice*, 15 FCC Rcd 8809 (2000) ("*Auction No. 31 Combinatorial Bidding Comment Public Notice*").

¹¹¹ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Memorandum Opinion and Order*, 15 FCC Rcd 21070, 21075, ¶ 12 (2000) ("*700 MHz Second Memorandum Opinion and Order*"), modified by Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Erratum*, 01-96 (2001) ("*700 MHz Erratum*").

¹¹² Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Notice of Proposed Rule Making*, 14 FCC Rcd 11006 (1999) ("*700 MHz Notice of Proposed Rule Making*"). Initially, the Commission decided not to use combinatorial bidding for Auction No. 31, determining that the existing competitive bidding rules generally would be adequate for the auction of licenses for all permitted uses in the Upper 700 MHz band. Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (2000) ("*700 MHz First Report and Order*"). On reconsideration, the Commission deferred on the issue and indicated that the Bureau may implement a combinatorial bidding design if appropriate. Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission Rules, WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000) ("*700 MHz Memorandum Opinion and Order*"). The Commission explained that it would revisit the issues generally raised by petition for reconsideration on combinatorial bidding in a further reconsideration order to be adopted prior to the due date for the filing of short forms and adopt any necessary rule changes at that time. *Id.*

¹¹³ *Auction No. 31 Combinatorial Bidding Comment Public Notice*, 15 FCC Rcd 8809.

¹¹⁴ *Auction No. 31 Combinatorial Bidding Comment Public Notice*, 65 FR 35636 (2000).

¹¹⁵ *Auction No. 31 Combinatorial Bidding Comment Public Notice*, 15 FCC Rcd at 8811.

¹¹⁶ See Comments of Alekandsar Pekec and Michael H. Rothkopf, "Making the FCC's First Combinatorial Auction Work Well" (filed June 9, 2000) ("Pekec/Rothkopf Comments"); Joint Comments of SBC (continued....)

Notice that set forth specific procedures for conducting a simultaneous multiple round auction with combinatorial or package bids.¹¹⁷ Upon review of the record, and based upon the Commission's experience in auction design, in the *700 MHz Second Memorandum Opinion and Order*, the Commission adopted a special rule, as part of the service-specific Part 27 competitive bidding rules, for calculating default payments in connection with the combinatorial bidding design employed in the Upper 700 MHz band.¹¹⁸

27. In essence, the combinatorial bidding default rule adopted in the *700 MHz Second Memorandum Opinion and Order* provides that where a winning bidder defaults on payments for a package bid(s) due after an auction closes or is disqualified after the auction, such payments will be calculated on a bid-by-bid basis, rather than on a license-by-license basis.¹¹⁹ The rule also provides a mechanism for calculating the default payment for those situations where a bidder defaults on a package bid and the licenses from the defaulted package are won in different packages in the subsequent auction.¹²⁰ The default payment consists of a deficiency portion *and* an additional twenty-five percent (25%) payment.¹²¹ The additional payment is 25% of the lesser of the subsequent winning bid and the defaulted bid and would be due even in the absence of a deficiency portion.¹²²

28. The deficiency portion of this rule is similar to the deficiency portion now contained in the default payment rule but modified to address the unique aspects of combinatorial bidding. For example, as noted above, the rule takes into consideration the fact that licenses may be sold in different packages in subsequent auctions.¹²³ As the Commission explained, the deficiency portion will make up any loss to the Commission that results when defaulted bid(s) are replaced by subsequent winning bid(s).¹²⁴ The additional payment component of the default payment was also modified to address the unique aspects of combinatorial bidding.¹²⁵ In an auction without combinatorial bidding, the additional payment is 3% of the lesser of the subsequent winning bid and the defaulted bid.¹²⁶ However, after consideration of the record and at the suggestion of commenters, the Commission adopted a 25% additional payment in the

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Wireless, Inc. and BellSouth Cellular Corp. ("SBC/BellSouth Joint Comments") and Attachment of Prof. Ronald M. Harstad ("Harstad Attachment") (filed June 9, 2000); Comments of Verizon Wireless (filed June 9, 2000); and Joint Reply Comments of SBC Wireless, Inc. and BellSouth Cellular Corp. (filed June 16, 2000).

¹¹⁷ Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 Procedures Implementing Package Bidding for Auction No. 31 Bidder Seminar Scheduled for July 24, 2000, Public Notice, 15 FCC Rcd 11526 (2000) ("Auction No. 31 Combinatorial Bidding Procedures Public Notice").

¹¹⁸ 700 MHz Second Memorandum Opinion and Order, 15 FCC Rcd at 21076-78, ¶ 15; 47 C.F.R. § 27.501.

¹¹⁹ 47 C.F.R. § 27.501(b).

¹²⁰ 700 MHz Second Memorandum Opinion and Order, 15 FCC Rcd at 21076-78, ¶ 14.

¹²¹ 47 C.F.R. § 27.501(b).

¹²² *Id.*

¹²³ 700 MHz Second Memorandum Opinion and Order, 15 FCC Rcd at 21076-78, ¶ 14.

¹²⁴ *See id.*

¹²⁵ 700 MHz Second Memorandum Opinion and Order, 15 FCC Rcd at 21078-79, ¶ 16-17.

¹²⁶ 47 C.F.R. § 1.2104(g)(2).

700 MHz Second Memorandum Opinion and Order.¹²⁷ The Commission adopted the 25% payment amount in recognition of the fact that the effects of a default in a combinatorial bidding auction require a strong deterrent against insincere bidding and strategic default.¹²⁸ As the Commission noted and as stated by commenters, in an auction with combinatorial bidding, a default may reasonably be expected to affect multiple licenses (and perhaps every license in the auction).¹²⁹ If the defaulting bidder had not bid, the licenses may well have been sold in different packages.¹³⁰ Thus, the Commission determined that the 25% payment component was necessary to adequately discourage insincere bidding and strategic defaults.¹³¹

29. Discussion. We hereby incorporate into the Part 1 general competitive bidding rules the combinatorial bidding default rule adopted in the *700 MHz Second Memorandum Opinion and Order*.¹³² We adopt this provision because, as noted above, the effects of default in a combinatorial bidding auction are so detrimental to the integrity of the auctions system that they require a strong deterrent against insincere bidding and strategic default.¹³³ As a commenter noted, in response to the *Auction No. 31 Combinatorial Bidding Comment Public Notice*, “[d]efault in a combinatorial auction has more far reaching consequences than does default in an auction of single items. In particular, a default in a combinatorial auction could affect the award of many other licenses and [could] be used strategically to do so.”¹³⁴ Thus, the rule as adopted in the *700 MHz Second Memorandum Opinion and Order* is necessary to adequately discourage defaults, deter frivolous or insincere bidding, and generally protect the integrity of the auction process.¹³⁵ The rule will be used to calculate default payments for all auctions

¹²⁷ See *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 17; 47 C.F.R. § 27.501(b) (2002). The Commission concluded that increasing the second component of the default payment from 3% to 25% was necessary to protect against insincere bidding and strategic default. In addition to suggesting the 25% additional payment, commenters suggested even more severe sanctions for defaulting bidders including imposing joint and several liability on defaulters and their real parties in interest, exclusion of defaulters and their real parties in interest from all future auctions, and suspension of defaulters’ FCC-regulated businesses until the default payment was made. See SBC/BellSouth Comments at 2-3; Pekec/Rothkopf Comments at § 6.

¹²⁸ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 17; see also Pekec/Rothkopf Comments at § 6; SBC/BellSouth Comments at 2-3.

¹²⁹ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 17.

¹³⁰ *Id.*; see Pekec/Rothkopf Comments at § 6; Joint Comments of SBC/BellSouth at 2-3.

¹³¹ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 17 (“[w]e believe that increasing the default payment is an appropriate response to this risk [of default], as the very purpose of the default payment rule, *inter alia*, is to deter frivolous or insincere bidding and generally protect the integrity of the auction process.”) (citations omitted); see Pekec/Rothkopf at § 6; Joint Comments of SBC/BellSouth at 2-3.

¹³² 47 C.F.R. § 1.2104(g)(3) as adopted herein; see *700 MHz Second Memorandum Opinion and Order* 15 FCC Rcd at 21076-78, ¶ 15; 47 C.F.R. § 27.501(b).

¹³³ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 17.

¹³⁴ Pekec/Rothkopf Comments at § 6; see Joint Comments of SBC/BellSouth at 2-3 (“Because a default can, and likely will, change the outcome of all licenses, not just those won by the bidder who defaults, the FCC must put rules in place that virtually guarantee defaults won’t occur); see also Paul Klemperer, *What Really Matters in Auction Design*, 16 J. Econ. Persp. 169, 176 (2002) (“If default costs are small, then bidders are bidding for options on prizes rather than the prizes themselves.”).

¹³⁵ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21078-79, ¶ 14 -17.

where a combinatorial bidding design is employed.¹³⁶ Although we adopt a new combinatorial bidding default rule, we remind bidders in combinatorial bidding auctions, that the competitive bidding rules are otherwise applicable. Thus, for example, the winning bid for a package creates the same obligation for the whole package as does a winning bid for a single license in the context of simultaneous multiple round auction without combinatorial bidding.¹³⁷

30. For convenience sake, we provide the following explanation of the application of the rule. This substantially reiterates the explanation provided in the *700 MHz Second Memorandum Opinion and Order*.¹³⁸

(1) Where a defaulting bidder held winning bids on individual licenses (*i.e.*, not as part of a package), and in a subsequent auction the licenses are also won individually, the deficiency portion will be calculated by subtracting the subsequent winning bid from the defaulted bid.¹³⁹ The deficiency portion for such bids will be calculated on a license-by-license basis (*i.e.*, in the event of defaults on multiple bids, the differences between the amounts originally bid and the amounts subsequently bid will not be aggregated to determine a net amount owed).¹⁴⁰ If the subsequent winning bid(s) exceed the defaulted bid(s), no deficiency portion will be assessed. Even in the absence of a deficiency portion, however, an additional 25% payment will be due.¹⁴¹

(2) Where a defaulting bidder won licenses in package(s), and in a subsequent auction the licenses are won either (a) in the same package(s), or (b) in smaller packages or as individual licenses that correlate to the defaulted package(s), the deficiency portion will be determined on a package-by-package basis.¹⁴² In the event a defaulting bidder defaults on more than one such bid, the differences between the amount originally bid and the amount(s) subsequently bid will not be aggregated to determine a net amount owed.¹⁴³ Thus, in this situation, the deficiency

¹³⁶ Where any of the relevant bids are subject to bidding credits, the default payment will be adjusted in an analogous manner to that used in 47 C.F.R. § 1.2104(g)(1).

¹³⁷ See 47 C.F.R. §§ 1.2107, 1.2109.

¹³⁸ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21076-78, ¶ 15; see also *Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002; Further Modification of Package Bidding Procedures and Other Procedures for Auction No. 31, Public Notice*, 17 FCC Rcd 7049 (2002) ("*Auction No. 31 Combinatorial Bidding Procedures Second Public Notice*").

¹³⁹ 47 C.F.R. § 1.2104(g)(3)(i)(a) as adopted herein.

¹⁴⁰ *Id.* For example, if a bidder defaults on two bids, one for License A for \$100 and one for License B for \$150, and in a subsequent auction, the licenses are won as License A for \$150 and License B for \$120, the default payment would be calculated separately for License A (by comparing the original bid (\$100) to the amounts subsequently bid (\$150), yielding no deficiency but an additional 25% payment) and License B (by comparing the original bid (\$150) to the amount subsequently bid for License B (\$120), yielding a deficiency of \$30, plus an additional 25% payment).

¹⁴¹ *Id.*

¹⁴² 47 C.F.R. § 1.2104(g)(3)(i)(b) as adopted herein.

¹⁴³ *Id.* For example, if a bidder defaults on Package ABC (*i.e.*, a package consisting of Licenses A, B and C) with a bid of \$900 and Package DE with a bid of \$600, and in a subsequent auction, the licenses are won as License A for \$200, Package BC for \$600, and Package DE for \$700, the default payment would be calculated separately for Package ABC (by comparing the original bid (\$900) to the amounts subsequently bid for License A (continued....))

portion will be calculated in a manner analogous to where the licenses are sold individually. However, with regard to each individual package, where the licenses are subsequently sold individually or as part of smaller packages, the amounts received in the subsequent auction will be aggregated in order to determine any deficiency.

(3) Where a defaulting bidder or bidders won licenses either individually or as part of packages, and in a subsequent auction the licenses are won as larger packages or different packages (not including the situation described in preceding paragraph), the deficiency portion will be calculated by subtracting the aggregate amount originally bid for the licenses from the aggregate amount bid in the subsequent auction for the licenses.¹⁴⁴ Thus, in this situation, the deficiency portion will not be calculated on a bid-by-bid basis.

(4) If, in a situation requiring that bids be aggregated in order to determine the deficiency portion of the default payments for bids, there are multiple defaulting bidders, the default payment (both the deficiency portion and the additional 25% payment portion) will be allocated to the defaulting bidders in proportion to their share of the aggregated default bids.¹⁴⁵

(5) In the event that a bidding credit applies to any applicable bids(s), the deficiency portion of the default payment will be assessed using the lesser of the difference between gross bids and the difference between net bids.¹⁴⁶ (In the event that a bidder does not have a bidding credit, the bidder's gross bid and net bid are the same). In other words, we will compare (i) the sum of the gross defaulted bid(s) minus the gross subsequent winning bid(s) and (ii) the sum of the net defaulted bid(s) minus the net subsequent winning bid(s). We will use the lesser of (i) and (ii) to calculate the deficiency portion of the default payment.

(6) The default payment consists of the deficiency portion *and* an additional 25% payment.¹⁴⁷ The additional payment will be 25% of the lesser of the subsequent winning bids(s) and the

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and Package BC (\$200 and \$600, which equals \$800, yielding a \$100 deficiency plus the additional payment)) and Package DE (by comparing the original bid (\$600) to the amount subsequently bid for Package DE (\$700, yielding no deficiency, but an additional 25% payment)).

¹⁴⁴ 47 C.F.R. § 1.2104(g)(3)(i)(c) as adopted herein. For example, if a bidder defaults on Package AB with a bid of \$200 and Package CD with a bid of \$300, and in a subsequent auction the licenses are sold as Package AC for \$250 and Package BD for \$250, the default payment would be calculated by aggregating the amounts originally bid (\$200 plus \$300 equals \$500) to the amounts subsequently bid (\$250 plus \$250 equals \$500) to determine the deficiency amount (\$500 less \$500 equals \$0); the additional payment would be based on either the original aggregate amount or the subsequent aggregate amount, whichever is less (in this case, they are the same, \$500).

¹⁴⁵ 47 C.F.R. § 1.2104(g)(3)(i)(d) as adopted herein. For example, if Bidder 1 defaults on Package ABC for \$200, and Bidder 2 defaults on Package DE for \$400, and in a subsequent auction the licenses are won in Package AB for \$150 and Package CDE for \$350, Bidder 1 would be liable for 1/3 of the default payment and Bidder 2 would be responsible for 2/3. The total default payment would be equal to the difference between the total of the original bids (\$600) and the total of the subsequent amounts bid (\$500) plus an additional amount of 25% of the total of the subsequent amounts bid. The total default payment therefore would equal \$100 (\$600-\$500) plus 25 percent of \$500 (\$125), for a total default payment of \$225.

¹⁴⁶ 47 C.F.R. § 1.2104(g)(3) as adopted herein.

¹⁴⁷ *Id.*

defaulted bid(s).¹⁴⁸ We will use the same gross or net bid(s) that were used to calculate the deficiency portion when assessing the additional 25% payment.¹⁴⁹ That is, we will compare the defaulted and subsequent bid(s) according to the methods described above for calculation of the deficiency portion of the default payment when determining whether the defaulted bid(s) or the subsequent winning bid(s) is the lesser amount.¹⁵⁰ Should there be no difference between the gross or net bid(s) for purposes of assessing the deficiency portion, we will assess the additional 25% payment using the lesser of the gross or net bid(s).

31. Finally, we note that we will maintain our practice of assessing an interim default payment with a slight modification.¹⁵¹ Specifically, in the case of combinatorial bidding defaults, we will assess a 25% interim default payment pending assessment of the final default payment after a subsequent auction. This procedure is appropriate because even under the most favorable set of circumstances for the defaulting bidder, *i.e.*, where the bid price for the package at the subsequent auction exceeds defaulted bid, the final default payment would be 25% of the defaulted bid.¹⁵²

C. Licenses Subject to Auction After Default in Combinatorial Bidding Auctions

32. When the Commission adopted the default rules, it stated, as a general rule, that in the event of default by a winning bidder, the best course of action would be to offer licenses for the spectrum in a subsequent auction.¹⁵³ Currently, under our Part 1 auction rules, if a bidder defaults on a bid (or bids), we may offer the license(s) for the spectrum in a new auction or we may also offer the license(s) to the other highest bidders.¹⁵⁴ In the *700 MHz Second Memorandum Opinion and Order*, the Commission determined that for combinatorial bidding in the Upper 700 MHz band if a bidder defaults on a package bid, we would auction the licenses making up the package on which the party defaulted, and only those licenses.¹⁵⁵ This would occur even if, under the combinatorial bidding procedures, a different set of packages would have won had the defaulting bidder not bid.¹⁵⁶ As the Commission explained in that *700 MHz Second Memorandum Opinion and Order*, any other result would be extremely problematic in the

¹⁴⁸ 47 C.F.R. § 1.2104(g)(3)(ii) as adopted herein.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See C.H. PCS, Inc., BTA No. B347 Frequency Block, *Order*, 11 FCC Rcd 22430, 22432-33 (1996) ("CHPCS") (assessing as a interim default payment the minimum the defaulting bidder would owe even under the most favorable circumstances), *aff'd* 14 FCC Rcd 9652; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563, n. 5; *see also* 47 C.F.R. § 1.2104(g)(1).

¹⁵² 47 C.F.R. § 1.2104(g)(3)(ii) as adopted herein; *see CHPCS*, 11 FCC Rcd at 22432-33.

¹⁵³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 204. The Commission was concerned that licenses would be awarded to the parties that valued them most highly, and in that situation of default after close of auction, that can best be served by a subsequent auction. *Id.*

¹⁵⁴ 47 C.F.R. § 1.2109(b).

¹⁵⁵ *700 MHz Second Memorandum Opinion and Order*, 15 FCC Rcd at 21073-74, ¶¶ 6-10.

¹⁵⁶ *Id.* In an auction with combinatorial bidding, bidders seeking inconsistent sets of packages may be competitive against each other. Whether licenses are sold as one type of package or another depends on which set yields the highest bids. *Id.* at n. 28

context of combinatorial bidding.¹⁵⁷ We see no reason to change this decision now. Accordingly, in all future combinatorial bidding auctions, we will not offer the package or licenses to the next highest bidder and will instead auction the license(s) for the spectrum in a new auction.

D. Conforming Edits to Competitive Bidding Rules

33. Background: In the *Part 1 Fifth Report and Order*, the Commission delegated authority to the Bureau to eliminate unnecessary service-specific competitive bidding rules from the Code of Federal Regulations (C.F.R.) that have either been superseded by or are redundant with the Part 1 general competitive bidding rules.¹⁵⁸ Accordingly, the Bureau, in the *Conforming Edits Order*, removed certain service-specific competitive bidding rules that were superseded or made redundant by the Part 1 general competitive bidding rules.¹⁵⁹ We now make certain ministerial conforming amendments and rule revisions to the Part 1 general competitive bidding rules and portions of the service-specific competitive bidding rules¹⁶⁰ to conform to the new rule revisions in Part 1. These rule revisions are consistent with our efforts to provide specific guidance to future auction participants and to streamline the competitive bidding regulations by eliminating certain service-specific rules.¹⁶¹

34. Discussion: As explained below, we revise or remove service-specific and/or Part 1 competitive bidding rules in the following areas: (1) license default; (2) definition of consortium; (3) women- and minority-owned businesses; (4) clarification of the attribution rule; (5) ownership disclosure requirements; and (6) short-form disclosure requirements for small or very small business consortiums. Also, technical edits are made to Commission rules that refer to service-specific competitive bidding rules that have been removed, revised, or modified.¹⁶²

¹⁵⁷ 700 MHz *Second Memorandum Opinion and Order*, 15 FCC Rcd at 21074, ¶¶ 8-10. The Commission has explained that when more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder. Thus, offering the license to the next highest bidder may not result in award of the license to the party that values it most highly. *Part 1 Third Report and Order*, 13 FCC Rcd at 461-62, ¶ 153; *see also* Letter to John E. Mason, et al. on behalf of Harbor Wireless, LLC, from Kathleen O'Brien Ham, Deputy Chief, Wireless Telecommunications Bureau, 16 FCC Rcd 3615 (2001) (denying a request to offer spectrum associated with a withdrawn high bid to the next highest bidder because such action would not ensure that the license will be awarded to the bidder who values it most highly.).

¹⁵⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15330, ¶ 78. The Part 1 general competitive bidding rules are found in 47 C.F.R. Part 1, Subpart Q ("Part 1 general competitive bidding rules").

¹⁵⁹ *Conforming Edits Order*, 17 FCC Rcd 11146.

¹⁶⁰ Service-specific rules are rules promulgated by the Commission that are tailored to a particular service. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2350, ¶ 10.

¹⁶¹ *Part 1 Third Report and Order*, 13 FCC Rcd at 376; *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15330, ¶ 78.

¹⁶² See 47 C.F.R. §§ 1.913(a)(2) and (b)(2), 1.919(a),(b) and (e), 1.948(c), 1.2103(a)(4) and (b), 1.2109(b) and (c), 1.2110(b)(1)(i), (b)(1)(ii), (b)(3)(i), (c)(2)(ii)(F), and (c)(6), 1.2112, 21.930(d)(2)(i), 21.954, 21.956(b)(2) and (b)(3), 21.960(a), 22.217, 22.223, 22.225(b), 22.229(b), 24.321(b) and (c), 24.709(b)(1)(v)(A)(3), (b)(1)(v)(A)(3)(iv), (b)(1)(vi)(A)(3), (b)(1)(vi)(A)(3)(iv), (c)(1)(ii)(F)(1), (c)(1)(ii)(F)(2), (c)(3), and (d), 24.711(a), 24.712(a) and (b), 24.714(c)(2)(iii), 24.716(a) and (b), 24.717, 24.720(b), (g) and (g)(2), 27.210(b), (b)(1) and (b)(2), 27.501, 27.502, 27.702(b), 27.807(b), 27.906(b), 27.1006(b), 73.5005(a), 73.5009(b), 80.1252(a) and (c), 90.810, 90.813(c)(2)(ii), 90.814(b), 90.815, 90.901, 90.910, 90.912(b), 90.913, 90.1017, (continued....)

35. License default. Section 1.2109, among other things, provides the conditions upon which a winning bidder will be deemed to have defaulted.¹⁶³ Specifically, subsection 1.2109(b) states, in pertinent part, that “[i]f a winning bidder withdraws its bid . . . the bidder will be deemed to have defaulted, *its application will be dismissed*, and it will be liable for the default payment specified in section 1.2104(g)(2).”¹⁶⁴ However, section 1.2109(c) states, in pertinent part, that “[a] winning bidder who is found unqualified to be a licensee . . . will be deemed to have defaulted and will be liable for the payment set forth in section 1.2104(g)(2).”¹⁶⁵ The language regarding the dismissal of an application was inadvertently omitted from section 1.2109(c).¹⁶⁶ Thus, we revise section 1.2109(c) to add dismissal language to conform to section 1.2109(b).

36. Definition of consortium. The Commission’s service-specific competitive bidding rules for several services define the terms “small business consortium”¹⁶⁷ and “very small business consortium.”¹⁶⁸ However, neither of these terms are defined in the Commission’s Part 1 rules.¹⁶⁹ To streamline our rules and eliminate redundancies, we incorporate a definition of the term “consortium” into our Part 1 rules. This definition is taken almost verbatim from the service-specific definitions. Accordingly, we delete the definitions of small and very small business consortium in the service-specific competitive bidding rules.¹⁷⁰

37. Further, the Commission has generally defined a “small or very small business consortium” as a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small or very small business as defined on a service-specific basis.¹⁷¹ In the *Part 1 Third Report and Order*, the Commission, in clarifying the Part 1 definition of affiliate, determined that a “consortium” for purposes of determining status as a designated entity will not be treated as a “joint venture” under the Commission’s attribution (Continued from previous page)

90.1021(b), 90.1023, 90.1103(a) and (c), 95.816(d), 101.538(b), 101.1107, 101.1109, 101.1112, 101.1209, 101.1429(b) as adopted herein.

¹⁶³ 47 C.F.R. § 1.2109.

¹⁶⁴ 47 C.F.R. § 1.2109(b).

¹⁶⁵ 47 C.F.R. § 1.2109(c).

¹⁶⁶ *Id.*

¹⁶⁷ 47 C.F.R. §§ 21.961(b)(2), 22.223(b)(2), 22.229(a)(4), 24.720(b)(3), 27.210(b)(4), 27.702(a)(4), 27.807(a)(3), 27.906(a)(3), 27.1006(a)(3), 80.1252(b)(3), 90.814(b)(2), 90.912(b)(3), 90.1021(b)(3), 90.1103(b)(3), 95.816(c)(3), 101.538(a)(5), 101.1112(f), 101.1209(b)(2), 101.1429(a)(4). In certain service-specific rules, entrepreneurs are included within the definition of consortium. *See, e.g.*, 47 C.F.R. § 101.1112(f).

¹⁶⁸ 47 C.F.R. §§ 22.229(a)(4), 24.720(b)(4), 24.210(b)(4), 27.702(a)(4), 27.807(a)(3), 27.906(a)(3), 27.1006(a)(3), 80.1252(b)(3), 90.912(b)(4), 90.1021(b)(3), 90.1103(b)(3), 95.816(c)(3), 101.538(a)(5), 101.1112(f), 101.1429(a)(4). In certain service-specific rules, entrepreneurs are included within the definition of consortium. *See, e.g.*, 47 C.F.R. § 101.1112(f).

¹⁶⁹ *See* 47 C.F.R. § 1.2110.

¹⁷⁰ 47 C.F.R. §§ 21.961(b)(2), 22.223(b)(2), 22.229(a)(4), 24.210(b)(4), 24.720(b)(3) and (b)(4), 27.210(b)(4), 27.702(a)(4), 27.807(a)(3), 27.906(a)(3), 27.1006(a)(3), 80.1252(b)(3), 90.814(b)(2), 90.912(b)(3) and (4), 90.1021(b)(3), 90.1103(b)(3), 95.816(c)(3), 101.538(a)(5), 101.1112(f), 101.1209(b)(2), 101.1429(a)(4).

¹⁷¹ *Id.*

standards.¹⁷² In that Order, however, we failed to also revise the Part 1 definition of a “small or very small business consortium.”¹⁷³ Thus, we revise the Part 1 rules to exclude the term “joint venture” from the definition of “consortium.”

38. Clarification of the attribution rules: In the *Part 1 Fifth Report and Order*, the Commission established a controlling interest standard for attributing to an applicant the gross revenues of the applicant, its affiliates, its controlling interest, and the affiliates of the applicant’s controlling interests in determining which applicants qualify as small businesses.¹⁷⁴ In doing so, as explained in detail above, the Commission amended the Part 1 competitive bidding rules to incorporate new rules adopting the controlling interest standard. Specifically, subsection 1.2110(c)(2)(ii)(F) provides, in pertinent part, that “[o]fficers and directors of an *entity* shall be considered to have a controlling interest in the *entity*.”¹⁷⁵ Under the controlling interest standard, however, a controlling interest includes individuals or entities, or groups of individuals or entities, that have control of the *applicant* under the principles of either *de jure* or *de facto* control.¹⁷⁶ Therefore, we revise subsection 1.2110(c)(ii)(F) to read, in pertinent part, that “[o]fficers and directors of an *applicant* shall be considered to have a controlling interest in the *applicant*.”¹⁷⁷

39. Additionally, we make slight modifications to section 1.2110(b)(1)(i) to provide further guidance to applicants. Specifically, the term “their affiliates” in subsection 1.2110(b)(1)(i) includes both affiliates of the applicant and affiliates of the applicant’s controlling interests.¹⁷⁸ Therefore, we revise subsection 1.2110(b)(1)(i) to read: “The gross revenues of the applicant (or licensee), *its affiliates*, its controlling interests and *affiliates of the applicant’s controlling interests* shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business. An applicant seeking status as a small business must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), *its affiliates*, its controlling interests and *affiliates of the applicant’s controlling interests* for each of the previous three years.”¹⁷⁹

40. Disclosure requirements for small businesses. Section 1.2112(a) of the Commission’s rules formerly required all applications to participate in competitive bidding or for a license, authorization, assignment, or transfer of control to disclose certain information pertaining to controlling interests including “a list of names, addresses, and citizenship of all controlling interests of the applicants, as set forth in § 1.2110.”¹⁸⁰ In the *Part 1 Fifth Report and Order*, the Commission determined that only applicants claiming small business status would be required to disclose controlling interest information

¹⁷² See *Part 1 Third Report and Order*, 13 FCC Rcd at 393-4, ¶¶ 29-30.

¹⁷³ *Id.*

¹⁷⁴ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-27, ¶¶ 58-67; 47 C.F.R. § 1.2110(c).

¹⁷⁵ 47 C.F.R. § 1.2110(c)(2)(ii)(F) (emphasis added).

¹⁷⁶ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324, ¶ 60; 47 C.F.R. § 1.2110(c)(2).

¹⁷⁷ 47 C.F.R. 1.2110(c)(ii)(F) as adopted herein.

¹⁷⁸ 47 C.F.R. § 1.2110(b)(1)(i).

¹⁷⁹ 47 C.F.R. § 1.2110(b)(1)(i) as adopted herein (emphasis added).

¹⁸⁰ 47 C.F.R. § 1.2112(a) (1999).

under section 1.2112.¹⁸¹ Accordingly, the controlling interest disclosure requirements from subsection 1.2112(a) were moved to section 1.2112(b) which applies to entities claiming eligibility for small business provisions.¹⁸² At the same time, section 1.2112(b) was divided into two parts: subsection (b)(1), applying to short-form applications; and subsection (b)(2), applying to long-form applications.¹⁸³ The controlling interest language from section 1.2112(a), however, was inadvertently only carried over to subsection (b)(1) instead of in both subsections (b)(1) and (b)(2).¹⁸⁴ In addition, in dividing section 1.2112(b) into two subsections, we failed to specifically mention applications for an assignment or transfer of control.¹⁸⁵ Accordingly, we make conforming edits to section 1.2112(b) to correct these inadvertent errors to fully implement our intent that all applicants claiming small business status, including those filing applications for a license, authorization, assignment, or transfer of control as well as those filing short-form applications, are required to disclose the controlling interest information.

41. As noted above, subsection 1.2112(b)(1)(i) requires an applicant to list, as part of the disclosure obligations, the "names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant."¹⁸⁶ However, in addition to these disclosures, certain service-specific rules also require the applicant to disclose the same information for affiliates and small and very small business consortium.¹⁸⁷ Subsection 1.2112(b)(1)(i) does not require the applicant to disclose this additional information.¹⁸⁸ We delete the service-specific short-form disclosure requirements and revise subsection 1.2112(b)(1)(i) to add affiliate and small or very small business consortium language as part of the short-form disclosure obligations.

42. Additionally, we revise subsection 1.2112(b)(1)(ii) to comport with the Commission's previous correction made to subsection 1.2112(a)(6) in the *Part 1 Erratum*.¹⁸⁹ Specifically, we revise subsection 1.2112(b)(1)(ii) to require applicants claiming eligibility for small business provisions to list any *FCC-regulated entity* (instead of the current requirement to list any FCC-licensed entity) or applicant for an FCC license in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities.¹⁹⁰ This revision is consistent with the Commission's intent, as stated in the *Part 1 Fifth Report and Order*, to require that FCC-regulated entities be reported when there is a connection between such entity and the applicant at issue through a common owner.¹⁹¹

¹⁸¹ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15299, ¶ 10.

¹⁸² *Id.*

¹⁸³ *See* 47 C.F.R. § 1.2112(b).

¹⁸⁴ *Compare* 47 C.F.R. § 1.2112(b)(1) with 47 C.F.R. § 1.2112(b)(2).

¹⁸⁵ 47 C.F.R. § 1.2112(b).

¹⁸⁶ 47 C.F.R. § 1.2112(b)(1)(i).

¹⁸⁷ 47 C.F.R. §§ 22.225(a), 90.815(a), 90.913(a), 90.1023(a).

¹⁸⁸ *Id.*

¹⁸⁹ *See Part 1 Erratum*, 15 FCC Rcd at 21526, ¶ 3.

¹⁹⁰ 47 C.F.R. § 1.2112(b)(1)(ii) as adopted herein.

¹⁹¹ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15299, ¶ 11.

43. Women- and minority-owned businesses. The Commission's rules set forth certain provisions applicable to designated entities - small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.¹⁹² In particular, subsection 1.2110(c)(3) of the Part 1 general competitive bidding rules defines and provides the eligibility criteria for businesses owned by members of minority groups and/or women.¹⁹³ However, sections 24.720 (c), (d), and (i)(2) also define women- and minority-owned businesses and qualifying minority and/or woman investor.¹⁹⁴ In light of the Commission's ongoing efforts to eliminate from the C.F.R. service-specific competitive bidding rules that are either repetitive with or have been superseded by the Part 1 general competitive bidding rules,¹⁹⁵ we delete sections 24.720 (c), (d), and (i)(2). Our action here is technical in nature and does not substantively affect the status of women- and minority-owned businesses.¹⁹⁶

IV. SECOND ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER

A. Installment Grace Periods and Imposition of Late Payment Fees

44. Background. In the *Competitive Bidding Second Report and Order*, the Commission adopted installment payment rules which permitted a licensee to make an installment payment up to 90 days after the due date without a late payment fee and without being considered in default.¹⁹⁷ However, a licensee whose installment payment was more than 90 days past due was in default, unless a "grace period" was requested prior to the payment due date.¹⁹⁸ In the *Part 1 Third Report and Order*, the Commission modified the grace period provisions as applied to all installment payment licensees by providing installment payment licensees with two automatic 90-day grace periods.¹⁹⁹ A licensee that failed to make an installment payment when due had an additional 90 days in which to submit its required payment without being in default, but was assessed a late payment fee equal to 5 percent of the amount of the past

¹⁹² 47 C.F.R. § 1.2110; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2393-98, ¶¶ 258-288; *Part 1 Third Report and Order*, 13 FCC Rcd at 386-389, ¶¶ 13-19, 394-395, ¶¶ 31-33; *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15318-15321, ¶¶ 45-53. The Commission's rules define designated entities as "small businesses, businesses owned by women or members of minority groups, and rural telephone companies." 47 C.F.R. § 1.2110(a); see 47 U.S.C. §§ 309(j)(4)(C)-(D). However, the term is generally used in a more limited context to refer to those entities qualifying for benefits available to small businesses.

¹⁹³ 47 C.F.R. § 1.2110(c)(3).

¹⁹⁴ 47 C.F.R. § 24.720(c), (d), and (i)(2). The Commission deleted race and gender based preferences from the broadband PCS rules prior to the first C block auction. See *Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 135, 156-59, ¶¶ 35-43, Appendix A, ¶ 172 (1995) (deleting section 24.711(b)(4)-(5)) ("*Competitive Bidding Sixth Report and Order*").

¹⁹⁵ See *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15330, ¶ 78.

¹⁹⁶ *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 156-59, ¶¶ 35-43, Appendix A, ¶ 172.

¹⁹⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2389-91, ¶¶ 231-240.

¹⁹⁸ 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(i) and (ii) (1994); see also *Reminder to Licensees with Installment Payment Plans: Availability of Grace Periods, Public Notice*, 12 FCC Rcd 7971 (1997).

¹⁹⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 434-42, ¶¶ 103-113.

due installment payment.²⁰⁰ If the licensee failed to make the required payment within the first 90-day period, the licensee was automatically provided a subsequent 90 days to submit its required payment without being considered in default, but was assessed an additional late payment fee equal to 10 percent of the amount of the past due installment payment.²⁰¹ A licensee that failed to make a timely payment was considered in default and the license canceled automatically without Commission action.²⁰²

45. Subsequently, in the *Order on Reconsideration of the Part 1 Third Report and Order*, the Commission adopted a minor modification to the payment due dates for late installment payments and associated fees.²⁰³ To avoid any confusion as to when late installment payments and late fees were due, instead of two 90-day periods, the Commission provided installment payment licensees, that fail to make timely payments, with two quarters (two 3-month periods) in which to submit their late installment payments and required late fees without being considered in default.²⁰⁴ In addition, the Commission rejected petitions for reconsideration that alleged the rule changes violated the prohibition on "primary" retroactive rulemaking under the Administrative Procedures Act as set forth in Supreme Court cases such as *Bowen v. Georgetown*.²⁰⁵ As the Commission explained, the changes to the installment payment rules did not violate such prohibitions because the changes did not impose penalties for past conduct.²⁰⁶ The Commission observed that licensees, in particular, have no vested right to an unchanged regulatory scheme throughout their license term.²⁰⁷ The Commission determined that the revised installment payment provisions were "consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates."²⁰⁸ The Commission also rejected arguments based upon contract principles, explaining that the Commission had never promised an unchanged regulatory regime.²⁰⁹ Thus, the Commission concluded that licensees were aware, or should have been aware, that the terms and conditions of the license could

²⁰⁰ *Id.* at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(i) (1998).

²⁰¹ *Part 1 Third Report and Order* at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(ii) (1998).

²⁰² *Part 1 Third Report and Order* at 438, ¶ 107; 47 C.F.R. § 1.2110(f)(4)(iii), (iv) (1998).

²⁰³ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15310, ¶ 28; 47 C.F.R. § 1.2110(f)(4) (1999) (redesignated as § 1.2110(g)(4) (2000)).

²⁰⁴ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15310, ¶ 28; 47 C.F.R. § 1.2110(g)(4).

²⁰⁵ *Bowen v. Georgetown University Hospital*, 488 U.S. 209, 219-20 (1988).

²⁰⁶ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15305, ¶ 21 (applying *Bowen*, 488 U.S. at 219-20).

²⁰⁷ *Id.* at 15306, ¶ 22 (citing *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking).

²⁰⁸ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15304-305, ¶ 19 (citing *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110).

²⁰⁹ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15307-308, ¶¶ 25-26 ("The Commission did not promise these licensees, or any other licensees, that the Part 1 rules would remain unchanged during the license term"); see also *Requests for Refunds of Down Payments Made in Auction No. 35, Order*, 17 FCC Rcd 6283, 6291, ¶ 15 (2002) ("*Auction No. 35 Order*").

be modified by the Commission through rulemaking procedures consistent with the Administrative Procedures Act.²¹⁰

46. After release of the *Part 1 Order on Reconsideration of the Third Report and Order*, the Court of Appeals for the District of Columbia addressed similar arguments concerning primary retroactivity and applicability of contract doctrines to changes in the Commission's installment payment rule.²¹¹ Specifically, in upholding the Commission's revised installment payment rule, 47 C.F.R. § 1.2110(f), as applied to the 218-219 MHz service licensees, the appellate court noted that Congress specifically provided that the introduction of auctions did not diminish the Commission's authority to change the terms of existing licenses by rulemaking.²¹² Thus, the appellate court concluded that the Commission is not precluded from modifying its installment payment regulations during the term of a license, and may apply new or modified regulations to its existing licensees.²¹³ Finally, the appellate court rejected the contract based theories, explaining that the Commission did not promise the licensees that the installment payment rules would not change and "far from there being any such promise, there was, as we've noted, a long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understanding to licenses acquired by auction."²¹⁴

47. Discussion. NextWave urges the Commission to restore the original installment payment rules as adopted in the *Competitive Bidding Second Report and Order*.²¹⁵ In its petition, NextWave again

²¹⁰ *Part 1 Order on Reconsideration of the Third Report and Order*, 15 FCC Rcd at 15307-308, ¶ 25; see also, *Auction No. 35 Order*, 17 FCC Rcd at 6283, ¶ 15 ("Auctions are a regulatory mechanism for distributing licenses. The relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions."), *reconsideration granted on other grounds*, 17 FCC Rcd 17079 (2002); BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17601, 17609-610, ¶¶ 18, 35 (2000) (explaining that the Commission's default rules are regulatory in nature and that contract law principles are not applicable to the circumstances where a bidder has defaulted on a license.)

²¹¹ *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001), *cert. denied*, 70 U.S.L.W. 3656 (U.S. June 17, 2002).

²¹² *Celtronix*, 272 F.3d at 588 (citing 47 U.S.C. § 309(j)(6)(C)) ("Nothing in this subsection, or in the use of competitive bidding, shall diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licenses.").

²¹³ *Celtronix*, 272 F.3d at 588.

²¹⁴ *Celtronix*, 272 F.3d at 590 (distinguishing *United States v. Winstar Corp.*, 518 U.S. 839 (1996)). Similarly, in the context of the prior lottery licensing scheme, an attempt to argue that applicants possessed contract rights in a particular regulatory scheme was recently rejected. *Folder, Coastal Communications Associates, and Longshore v. United States*, docket No. 01-456C, Slip. Op. at 16, (Ct. Fed. Cls. March 28, 2003) ("The long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to the plaintiffs.") (citing *Celtronix*, 272 F. 3d at 590).

²¹⁵ NextWave Petition at 4-7; see *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-91, ¶¶ 231-240. This Order does not address the petitions for reconsideration challenging the Commission's statement that section 1.2104(g)(2) does not apply to licensees who default on their installment payments. *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15315-316, ¶¶ 38-39. We received three petitions for reconsideration on this point. NextWave Petition, TeleCorp/Tritel/Poplar/Summit Petition, and MetroPCS Petition. We will address this point in a subsequent order.

relies upon the arguments that the modifications to the rules constitute impermissible retroactive rulemaking,²¹⁶ that the changes were unreasonable and not consistent with commercial practices, and that contract based theories precluded the Commission from modifying the installment payment rules.²¹⁷ As noted above, these arguments were previously the subject of reconsideration and fully considered and rejected in the *Order on Reconsideration of the Part 1 Third Report and Order*.²¹⁸ Additionally, as also noted, the Court of Appeals for the District of Columbia Circuit has substantially addressed and rejected these arguments in the context of a challenge to the application of the revised installment payment rules to the 218-219 MHz Service licensees. In light of these circumstances, we decline to grant reconsideration.²¹⁹

48. The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented.²²⁰ This is particularly true where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration.²²¹ If this were not the case, the Commission "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct business in an orderly fashion."²²² However, the Commission will entertain a petition for reconsideration if it is based on new evidence or changed circumstances or if the reconsideration is in the public interest.²²³ In this instance, NextWave's arguments were previously raised and fully addressed in the *Order on Reconsideration of the Part 1*

²¹⁶ NextWave Petition at 6.

²¹⁷ *Id.* at 5 -7.

²¹⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15304-309, ¶¶ 18-26; *Compare* NextWave Petition, filed September 28, 2000, in response to the *Order on Reconsideration of the Part 1 Third Report and Order with NextWave Petition*, filed February 17, 1998, in response to the *Part 1 Third Report and Order*.

²¹⁹ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15304-310, ¶¶ 18-28.

²²⁰ Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, *Memorandum Opinion and Order*, 4 FCC Rcd 2276, 2277 (1989); Simplification of the Licensing and Call Sign Assignment Systems for Stations in the Amateur Radio Service, *Memorandum Opinion and Order*, 87 FCC.2d 50, 505 (1981) (citing *WWIZ, Inc.*, 37 FCC 685 (1964)); 47 C.F.R. § 1.429(i) ("any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.").

²²¹ See Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 8520, 8525-26, ¶¶ 14-20 (2002) ("218-219 MHz Service Third Order on Reconsideration") (declining to address matters that were fully considered and previously rejected in a prior order on reconsideration).

²²² Applications of Warren Price Communications, Inc. Bay Shore, New York et al., For a Construction Permit for a new FM Station on Channel 276 at Bay Shore, New York, *Memorandum Opinion and Order*, 7 FCC Rcd 6850 (1992) (stating that a second petition for reconsideration is not contemplated by the rules and may be dismissed as repetitious) (citing VHF Drop-Ins, 3 Rad. Reg. 2d 1549, 1551 n.3 (1964)).

²²³ 47 C.F.R. § 1.429(b); see *218-219 MHz Service Third Order on Reconsideration*, 17 FCC Rcd 8520.

Third Report and Order. ²²⁴ NextWave did not plead or otherwise establish new facts, changed circumstances, or new public interest considerations that would merit review of its request for reconsideration. Thus, we dismiss NextWave's arguments here as repetitious.

B. Ownership Disclosure Requirements

49. Background. In the *Order on Reconsideration of the Part 1 Third Report and Order*, the Commission revised section 1.2112(a) which requires each application for competitive bidding (i.e., short-form application), ²²⁵ or for a license, authorization, assignment or transfer for control ²²⁶ to disclose fully the real party or parties in interest. ²²⁷ Specifically, the Commission deleted unnecessary language, clarified certain subsections, and reordered the disclosure requirements in order to provide applicants with a clearer understanding of the information that must be disclosed. ²²⁸ Although the reorganization in general has resulted in greater clarity for applicants, we are concerned that the current structure of the rule may be construed by some applicants as allowing them to provide less than a full disclosure of all the real parties in interest. Such a result would be contrary to our expressed intent in reorganizing the rule. ²²⁹

50. Discussion. We reorder section 1.2112 to move the requirement that each application for competitive bidding, or for a license, authorization, assignment or transfer for control fully disclose all "real party or parties in interest" from section 1.2112(a) to subsection 1.2112(a)(1). ²³⁰ At the same time,

²²⁴ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15302-10, ¶¶ 16-28.

²²⁵ 47 C.F.R. § 1.2112; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-77, ¶¶ 161-68; see also 47 C.F.R. § 1.2105.

²²⁶ 47 C.F.R. § 1.2112; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 199; *Part 1 Third Report and Order*, 13 FCC Rcd at 420, ¶ 77, 422, ¶ 80; see also 47 C.F.R. § 1.2107(c).

²²⁷ The requirement to disclose the real party in interest has been a longstanding requirement for wireless licenses. See e.g., 47 C.F.R. §§ 21.13, 25.522, 25.531, 90.123 (1993); 47 C.F.R. § 101.19 (1998) (Fixed Microwave Services); 47 C.F.R. § 22.108 (1998) (Public Mobile Services); 47 C.F.R. § 1.914 (1994) (generally requiring that applications "contain full and complete disclosures with regard to the real party or parties in interest and as to all matters and things required to be disclosed by the application forms."). Although section 1.914 was subsequently deleted in 1999, the real party in interest disclosure language was incorporated into section 1.919(e) and applied to applicants for wireless licenses where section 1.2112 was not applicable. 47 C.F.R. § 1.919(e). In 1994, the requirement to fully disclose the real party in interest was incorporated into the competitive bidding rules. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5656 (1994); 47 C.F.R. § 24.813 (1994).

²²⁸ *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15299-301, ¶¶ 10-12.

²²⁹ See *Order on Reconsideration of the Part 1 Third Report and Order*, 15 FCC Rcd at 15299-301, ¶¶ 10-12.

²³⁰ 47 C.F.R. § 1.2112(a)(1) as adopted herein. The Commission has explained that the test for determining real party in interest to an application is whether that party has an ownership interest in the applicant or will be in a position, actually, or potentially, to control the operation of the station. See *Video/Multipoint, Inc. for Authority to Construct and Operate Multichannel Multipoint Distribution Service Stations on the F-Group Channels at Richmond, Virginia and Syracuse, New York, Memorandum Opinion and Order*, FCC Rcd 5313 (1992) (citing *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987) and *KOWL, Inc.*, 49 FCC 2d 962, 964 (1974)); *Applications of David Lausten and Broadcast Data Corporation for Authority to Construct and Operate Two Multichannel Multipoint Distribution Service Stations on the E-Group Channels and* (continued....)

we conform subsection 1.2112(a)(1) to the disclosure requirements as set forth in section 1.919(e)²³¹ to ensure that applicants include a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant.²³² We also remind applicants that, if the information disclosed pursuant to section 1.2112(a) changes while the application is pending, section 1.65 of the Commission's rules requires that additional or corrected information be submitted.²³³ These rule revisions are consistent with our efforts to provide specific guidance to applicants, to provide transparency at all stages in the competitive bidding and licensing process; and, finally to ensure that the Commission, the public, and interested parties, are aware of the real party or parties in interest before the Commission acts on a pending application.²³⁴

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Analysis

51. As required by the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis for the *Order on Reconsideration of the Part 1 Fifth Report and Order*, set forth at Appendix C. The Commission has also prepared a second Supplemental Final Regulatory Flexibility Analysis for the *Second Order on Reconsideration of the Part 1 Third Report and Order*, set forth at Appendix D.

(Continued from previous page)

the F-Group Channels for Aberdeen, South Dakota, *Memorandum Opinion and Order*, 3 FCC Rcd 2053 (1988) ("*Lausten/Broadcast Dismissal Order*"); Instructions to FCC Form 601 at 14, Item 14 (defining real party in interest as a person who "has an ownership interest, or will be in a position to actually or potentially control the operation of the station.") (quoting *Astroline Communications Co. Ltd. Partner v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988), citing Applications of Georgia Public Telecommunications Commission, et al., MM Docket No. 89-337, 7 FCC Rcd 7996 (1992); Applications of Madalina Broadcasting, et al., MM Docket No. 91-100, 8 FCC Rcd 6344 (1993)); *Heitmeyer v. FCC*, 95 F. 2d 91, 99 (D.C. Cir. 1937) (In determining the real party in interest, the Commission has recognized that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of finances); see also Black's Law Dictionary 874 (6th ed. 1991) (A "real party in interest" is "a person who will be entitled to benefits of action if successful, that is, the one who is actually and substantially interested in subject matter as distinguished from one who has only nominal, formal, or technical interest in or connection with it.").

²³¹ 47 C.F.R. § 1.919(e) (provides that a disclosure of the real party in interest necessarily includes "complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant and licensee.").

²³² In determining the real party or parties in interest, we also advise applicants to review the types of agreements listed in section 1.2105(2)(viii). See *Lausten/Broadcast Dismissal Order*, 3 FCC Rcd 2053 (agreements entered into by the applicant altered the real party in interest to the application).

²³³ 47 C.F.R. § 1.65; see AT & T Wireless Services, Inc. Washington, DC, *Notice of Apparent Liability for Forfeiture*, 17 FCC Rcd 9903, 9910-11, ¶ 17 (2002) (citing *Pinelands, Inc. and BHC Communications, Inc.*, 7 FCC Rcd 6058, 6064, n. 25 (1992); *WPIX, Inc.*, 33 FCC 2d 782, 783-84 (1972)) (Section 1.65 imposes an affirmative obligation on regulated entities to inform the Commission of the facts needed to fulfill its duties). However, we note that disclosure of changed information may implicate other Commission rules, including rules prohibiting major modifications of applications. See, e.g., 47 C.F.R. § 1.2105(b) and (c); see also *Trompex Corporation, Order on Reconsideration*, DA 03-636 (rel. March 6, 2003).

²³⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd at 376.

B. Paperwork Reduction Act Analysis

52. This *Second Order on Reconsideration of the Part 1 Third Report and Order, and Order on Reconsideration of the Part 1 Fifth Report and Order* contains new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public and other Federal agencies are invited to comment on the new or modified collection(s) contained in this proceeding.

C. Ordering Clauses

53. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petitions for reconsideration and informal requests for clarification filed in response to the *Order on Reconsideration of the Part 1 Third Report and Order*, and the *Part 1 Fifth Report and Order* to the extent they are addressed herein are GRANTED in part and DENIED in part.

54. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petition for reconsideration filed by NextWave in response to the *Order on Reconsideration of the Part 1 Third Report and Order* is DISMISSED to the extent indicated herein.

55. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Second Order on Reconsideration of the Part 1 Third Report and Order*, and the *Order on Reconsideration of the Part 1 Fifth Report and Order* are hereby ADOPTED and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix A, effective 60 days after publication in the *Federal Register*.

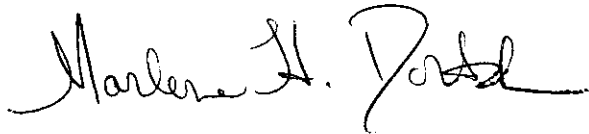
56. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau has the authority to make conforming edits to the Code of Federal Regulations relating to the Part 1 general competitive bidding rules.

57. IT IS FURTHER ORDERED that the requests of Cable and Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. for waiver of 1.2110(c)(2)(ii)(F) as presented in their Applications to Participate in an FCC Auction (FCC Form 175) for Auction No. 44 are GRANTED conditioned upon the submission to the Commission of information demonstrating compliance with the factors of 47 C.F.R. § 1.2112(b)(2)(iv), as adopted herein.

58. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Second Order on Reconsideration of the Part 1 Third Report and Order, and Order on Reconsideration of the Part 1 Fifth Report and Order*, including the Supplemental Final Regulatory Flexibility Analyses to the Chief Counsel for Advocacy of the Small Business Administration.

59. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch". The signature is fluid and cursive, with the first name "Marlene" being more legible than the last name "Dortch".

Marlene H. Dortch
Secretary